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Perspectives on Decisionmaking from the Blackmun Papers: The Cases on Arbitrability of Statutory Claims

*Ellen E. Deason**

I. INTRODUCTION

Judges' decisions must rank among the most documented types of decisionmaking. At the appellate level, in particular, the arguments made to judges are a matter of record and the decisions are recorded in written opinions that provide a reasoned explanation. Yet there are many unknowns about this decisionmaking process. This article draws on information found in the Blackmun Papers collection at the Library of Congress to explore Supreme Court decisionmaking as illustrated in the series of cases that opened the door to welcome arbitration of statutory claims.¹ The cases brought about the weakening and eventual abrogation of a long-standing precedent and the papers shed some light on the incremental steps by which this happened. The Justice's individual explanations for their votes reveal an exercise of discretion based on varying rationales – principles of statutory interpretation, policy leanings, and concern for the practical effect of the Court's decisions – that are intertwined with the question of the reach and continuing validity of one of the Court's major arbitration precedents.

One of the difficulties in examining any particular Supreme Court opinion is that it is a collective product.² Because it speaks for the majority of the Court, the opinion must mask the decisionmaking variations of the individual Justices. The author of an opinion may emphasize or de-emphasize themes so

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1. The author served as a law clerk for Justice Blackmun in October Term 1986. None of the arbitration cases discussed in this article was assigned to her.

2. This is true for Courts of Appeals decisions as well, but the effect is more pronounced at the Supreme Court where the collective comprises nine instead of three judges and its composition is relatively constant.

that it is acceptable to all the Justices in the majority.³ Other Justices' views may be taken into account during the initial drafting in the author's chambers or later, in response to a request for an alteration after the draft opinion has been circulated to the Court. The result is that an opinion does not necessarily reflect the way the author would justify the decision if he or she were the sole decisionmaker. It is even less likely to provide an accurate reflection of the rationales of the author's colleagues, whose drafting roles are limited to commenting.

A majority opinion also masks individual decisionmaking because it is constructed for a formal institutional goal. It is the official statement rationalizing the Court's decision and the document that guides the law.⁴ The purpose of an opinion is not to provide a transcription of the actual reasoning process by which the author, or any of the other Justices, reached their conclusions in the case. An opinion is also no place for recording doubts or countervailing considerations, even if the Justices struggled with them. Instead, an opinion is a form of persuasive writing. It provides a justification to the parties, the public, and other judges who will later apply the decision as precedent. As such, it must deal with all the significant arguments raised by the parties, not merely the ones that were actually decisive for the Justices.⁵

Nonetheless, there is great interest in the Justices' personal decisions. Their individual reasoning is important to advocates as they shape the issues in what may become future Supreme Court cases. That reasoning is displayed most clearly when a Justice departs enough from the majority to motivate a concurrence or dissent. These separate opinions sometimes express views in personal terms, although that is less likely if the opinion is drafted to reflect the views of more than a single author. And as with majority opinions, there is usually a purpose that may obscure the expression of personal reasoning.

3. See, e.g., James J. Brudney & Cory Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 28 (2005) ("Judicial reasoning is highly situation-specific, reflecting sensitivity to the novelty and difficulty of issues presented [and] the nature of divisions among the Justices.").

4. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 18-19 (1997) (describing the "rule of law" as requiring a "reasoned elaboration of the connection between recognized, pre-existing sources of legal authority and the determination of rights and responsibilities in particular cases"); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) ("Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering.").

5. Furthermore, opinions are typically crafted in the first instance by a law clerk. (This is not always the case, however. Justice Blackmun, for example, wrote some opinions without any assistance from his clerks.) At best, a clerk is one step removed from the Justice's actual reasoning process. So even if recording that reasoning process were the goal, it would be imperfectly achieved under the current practices of the Court.

That purpose may be pure protest, an attempt to guide the application of the majority's decision, or a desire eventually to convince a future court, legislature, or perhaps even the public. Thus even separate opinions may offer only a limited understanding of individual decisionmaking.

The Blackmun Papers offer an expanded view of the process, going behind the collective, purposeful published opinions. Despite this, those who turn to the Blackmun Papers to forecast the future are likely to be disappointed; the Papers are of limited use as a crystal ball because all the case files are more than ten years old. They are invaluable, however, for the light they shed on the decisionmaking process. From this perspective, while individual views are the crucial starting point for the Court's collective decisions, they are not the whole story. Court opinions not only de-emphasize individual judgments, they also obscure the institutional process by which group decisions are reached and opinions drafted. Justice Blackmun's papers offer new insights, both individual and institutional. They provide evidence of what individual Justices saw as important to the exercise of their discretion. They also reveal something of the process by which those judgments were consolidated into an institutional decision.

The papers offer an opportunity to supplement the views of the Supreme Court that emerge from empirical studies of decisionmaking. Social science studies tend to analyze voting patterns.⁶ Votes are an easily quantifiable variable, but this approach expresses the meaning of decisions in narrow terms of affirmances, reversals or other dispositions, obscuring the importance of the content of judicial opinions⁷ and the process by which they are created.⁸ Recently there has been increased empirical work on judicial reasoning in opinions that offers a new dimension to decisionmaking studies.⁹ But as discussed

6. Many of these studies analyze judicial decisionmaking by party affiliation. See, e.g., Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUSTICE SYS. J. 219 (1999) (citing studies and concluding that voting patterns support a "political" or "attitudinal" model which posits that judicial votes follow political ideology).

7. See, e.g., Theodore W. Ruger, et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1162 (2004) ("Because our study does not account for th[e] content [of judicial decisions] there is much is does not, and cannot, say about the judicial process.").

8. With regard to judicial processes in the courts of appeals, Judge Harry T. Edwards is a leading critic of empirical studies that claim personal ideology and political leanings are a major determinant of decisions. See, e.g., Harry T. Edwards, *The Effects of Collegiality on Judicial Decisionmaking*, 151 U. PA. L. REV. 1639, 1640-41 (2003) ("These scholars invariably ignore the many ways in which collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions.").

9. See, e.g., Brudney & Ditslear, *supra* note 3; Daniel Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409 (2000); Jane

above, even opinions offer a limited view in that they are constructed products that speak for a group of Justices; they are not designed to reveal the dynamics of decisionmaking – either individual or collective. The Blackmun Papers provide an additional qualitative perspective on decisionmaking at the Supreme Court. They allow an assessment of individual justices' views in terms of expressed reasoning rather than mere votes, and they offer insight into how an institutional opinion of the court is formed from a collection of individual views.

The Blackmun Papers provide a glimpse into the justices' individual reasoning processes in several ways. First, Justice Blackmun's own reasoning is memorialized at the pre-argument stage of each case in a memo he wrote for his personal use. He appears to have used these memos as a tool to work out his position and reasoning; as such, they provide a window into his contemporaneous thinking process.

The memos I examined tended to follow a typical pattern. Blackmun started with initial notes on the claims in a case and then cataloged the holdings and reasoning of the lower courts. After that, he indicated his vote, often in tentative terms. This was followed by notes on the relevant precedents and arguments, often indicating that they pointed in opposite directions. One can surmise that Blackmun used these memos as working documents, for they contain extensively underlined passages, notes in the margins and additions at the end.

Second, Blackmun habitually took notes at the Court's Wednesday and Friday conferences that reveal what his colleagues said to explain their votes at that point in the deliberative process.¹⁰ He met with his clerks immediately after the conference and, referring to these notes, explained each Justice's position in turn. These sessions allowed the clerks to gauge which rationales for the decision needed to be included in a draft opinion in order to retain the

S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001); Gregory C. Sisk, et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

10. These conferences were held to vote on cases following oral arguments. For a history of the court's conferences during the twentieth century, see THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 59-128 (Del Dickson ed., 2001).

In taking notes, Justice Blackmun wrote in pencil on two sheets of paper, each divided into four boxes headed with the Justices' names in order of seniority, which is the order in which they speak in conference. In the early years Justice Blackmun did not have his own box and he typically recorded his vote in the middle of Justice Marshall's box. Later, that box was divided in half with a small box for Blackmun below Marshall's.

support of the Justices who had voted with Blackmun. They were also useful for anticipating arguments that would be raised in dissent.¹¹

The conference notes raise many questions about how they should be interpreted. Of central importance is the extent to which they are representative of what each Justice said and the level of detail of the discussion. The Justices' statements in the notes seem somewhat truncated, but that may reflect discussions held in a verbal shorthand made possible by the Justices' familiarity with the arguments in each case. The notes are enlivened with what appear to be the Justices' own expressions, but they certainly do not read as a verbatim transcript. Blackmun's reliance on these notes while communicating his colleagues' views to his clerks suggests that one of his purposes in taking them was to ensure that his draft opinions reflected the reasoning of the other Justices who would consider joining them. Justice Blackmun would have wanted an adequate version of each Justice's views for this purpose, but he would not necessarily have needed to include every detail. The notes would have been useful to him as a reminder of what was said, even if they did not record every comment fully. In my view, Blackmun's notes are best regarded as a summary of how each Justice described his or her reasoning, not as a full expression of the discussion.

The notes are a limited source of insight into the decisionmaking process in that they do not, of course, necessarily reveal any Justice's inner thoughts or motivations. What each Justice said in conference was expressed in the institutional setting of the Court and surely would have been affected by that context. Their comments were likely a strategic selection of their views, limited for reasons of economy of discussion, persuasion, or collegiality. But, even if not completely candid, the reasons offered within the confines of the conference room provide information on individuals' stances far beyond what can be gleaned from opinions.

Third, draft opinions and messages exchanged among Justices concerning those drafts provide additional insight into individual Justice's decisions by revealing what they thought was important to include or exclude from the Court's opinion. More significantly, the circulations and exchanges demonstrate the institutional process for building the Court's opinion from a single Justice's draft. That process is interactive. Justices propose changes, sometimes as a request and sometimes as a condition for joining an opinion. Authors respond and accommodate. Opinions evolve through repeated circulations until everyone has written or joined an opinion.

Unfortunately, the files in the Blackmun Papers do not provide a complete record for this stage of every case. Some files contain a full set of draft opinions, requests for changes, and the "join" notes sent by Justices to the author of the opinion when they were sufficiently satisfied to add their name.

11. The information was important even when Justice Blackmun was not assigned to write the opinion; clerks for other Justices were able to consult with the Blackmun clerks to learn the basis for the Justices' votes before preparing draft opinions.

Other files are completely missing copies of the drafts that circulated and the subsequent communications, while some contain a partial selection of these materials. There are also some notes on Blackmun's phone conversations with other Justices regarding opinions. These materials do provide, however, at least a partial record of the way in which the justices negotiated court opinions during the review process.

I drew on these materials to examine the Court's decisionmaking in a series of cases that is significant because it illustrates development of the law in the context of changing policy perspectives.¹² The cases presented the Court with questions about the importance of maintaining a long-standing precedent, set forth in *Wilko v. Swan*,¹³ in which the Court in 1953 had ruled against the arbitrability of a statutory claim. *Wilko*'s interpretation was weakened and finally discarded as the Court moved from suspicion to a whole-hearted embrace of arbitration as an alternative to the judicial process. In these cases we observe the creation of a presumption now ensconced as a substantive canon of statutory interpretation: the "[r]ule favoring arbitration of federal statutory claims."¹⁴

The cases also speak to the role of the Court as an active agent of legal change. Lower courts began to depart from their long-standing interpretation of *Wilko* (thus presenting the issue for decision by the Supreme Court) only after Justice White authored concurring comments that pointedly cast doubt on that interpretation. More broadly, the cases raise questions about the appropriate boundary between the Court and Congress. When the Court overturned its reading of the statute at issue in *Wilko*, it abrogated an interpretation that had been solidly entrenched in the law and not altered by Congress. Under standard canons of statutory construction, these circumstances normally give rise to a presumption of congressional approval.¹⁵ That presumption was not recognized in this case.

The Blackmun Papers also demonstrate that decisions in the statutory arbitration cases were products of Justices' individual exercise of discretion based on their analyses of the statutes, history, precedent, and policy values. Some might view the arbitrability cases as an inexorable progression in which the Court purposefully created the legal conditions for business interests to move major categories of cases from the courts to arbitration. But the decisions were instead often a product of narrow and shifting majorities. In addition to changes in Court membership, these shifts occurred because Justice

12. See ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923) (describing the challenge of reconciling the need for change with the need for stability in the law)

13. 346 U.S. 427 (1953).

14. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 106 (1994).

15. The Rehnquist Court has observed a "[s]uper strong presumption of correctness for statutory precedents." *Id.* at 100.

White reversed his views on the question of arbitration of statutory claims and Justice Blackmun accepted arbitration of these claims in some, but not all circumstances.¹⁶ The papers supplement the published opinions to demonstrate how different factors led the Justices to differing views on appropriate limits for arbitrating statutory claims.

For some of the decisions, the Papers also illustrate how individual votes became joint opinions. In more than one of these cases, the Justices in the majority graciously and formally suggested revisions to the author's drafts to remove language inconsistent with their views and add missing grounds they endorsed. As a result of persuasive arguments and mutual accommodations by both authors and joiners, some of the rationales individual Justices described as important to their thinking were incorporated into the opinion of the court; some were not. Some of the passages they objected to were excised, others were not. The published decisions that resulted were thus a complex combination of individual judgments that were distilled through a negotiation process into a decision of the court as a whole.

II. BACKGROUND ON THE ARBITRABILITY CASES

The series of arbitration cases in which the Court gradually expanded parties' ability to arbitrate statutory claims are important to dispute resolution scholars because they are emblematic of doctrinal changes that have enhanced the role of arbitration as a substitute for judicial decisionmaking. Along with other cases establishing a broad reach for the Federal Arbitration Act (FAA),¹⁷ the statutory arbitration cases have permitted the expansion of the use of arbitration into new subject areas with new types of participants.

16. The composition of the Court's majorities shifted in even more complex ways if one also considers the Justices' positions in the other arbitration cases decided during this time period. Justice O'Connor, for example, opposed an expansive reading of the FAA in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), in which the Court held that the FAA preempts conflicting state law. But in later cases, she adhered to this precedent as a matter of stare decisis even when Justices Thomas and Scalia advocated overturning it. See *Allied-Bruce Terminix v. Dobson*, 513 U.S. 249 (1995); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 679 (1995).

17. The United States Arbitration Act (later known as the Federal Arbitration Act (FAA)), was passed in 1925. Section 2 provides for the enforceability of agreements to arbitrate as follows: "a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). The Supreme Court has taken a broad view of the applicability of the FAA and a narrow view of the statute's exclusions. See, e.g., *Southland Corp.*, 465 U.S. 1 (holding the FAA preempts conflicting state law); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (interpreting "a contract evidencing a transaction involving commerce" broadly to extend the FAA's reach to the limits of the commerce clause

This expansion is not universally applauded. The arbitration process originated for private disputes, but the Court's permission for parties to extend it to statutory claims has resulted in its widespread use for resolving issues of public concern. Moreover, while arbitration was traditionally used by agreement among parties of relatively equal standing or bound by common group membership, in the United States it is now frequently imposed on employees and consumers who are forced to accept arbitration under the terms of adhesion contracts or notices requiring no signature.¹⁸ When coupled with the arbitration of statutory claims, these developments mean that public values embodied in statutes are being implemented through a private process that has been characterized as "nonconsensual."¹⁹ Scholars argue that the procedural, and sometimes even substantive, consequences of this expansion of arbitration may threaten those public values.²⁰

Using arbitration to resolve statutory claims also has controversial consequences for the arbitration process itself. Arbitration was developed for decisions based on the parties' contract, as applied in the context of the norms of a particular community.²¹ It has procedural features well-suited for this function: freedom to select arbitrators without legal training for their relevant

power); *Doctor's Assocs.*, 517 U.S. 679 (holding FAA preempts state notice requirements); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 102 (2001) (interpreting exclusion for employment contracts narrowly).

18. See, e.g., Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 451-52 (1996); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631, 1635 (2005); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 933-34, 978, 992, 994-95 (1999).

19. See, e.g., Sternlight, *supra* note 18, at 1648-49. But see Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 113-26 (1996) (arguing that consent to most pre-dispute employment arbitration clauses is voluntary under the contract law doctrines of mutual assent and duress).

20. See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381 (1996); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 400-02 (1999); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 678-85 (1996). See generally Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-79 (1986) (raising concern that public values reflected in legislation will be ignored in private processes of dispute resolution).

21. Hence, in the labor context, an arbitral award "is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). See generally Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. REV. 1199, 1235-36 (2000) (discussing extrajudicial origins of arbitration).

expertise, procedures designed for speed and low cost, and extremely narrow opportunities for the parties to invoke judicial oversight.²² Now, however, these procedures are being used in arbitrations that interpret and apply public values expressed in legislation – a function for which they were not designed. The response, in part, has been an attempt to adapt arbitral procedures to the challenges of this expanded function of statutory interpretation and application. New arbitral procedures and safeguards, such as written arbitral awards and judicial review for errors of law, have been proposed²³ and some parties are incorporating such terms into their arbitration agreements.²⁴ But these developments raise concerns that arbitration is beginning to look much more like litigation, a worrisome trend that may undermine many advantages the arbitration process offered in its original, more private context.²⁵

The Papers provide a new perspective on the series of cases that generated this changed world of arbitration. They reveal that in the early 1970s there were already Justices willing to overrule the limitation the Court had earlier imposed on the arbitration of statutory claims in *Wilko v. Swan*. Overall, there was a growing hostility to *Wilko* as the Court repeatedly went on record favoring arbitration as a matter of public policy. Consistent with current criticisms of arbitration of statutory claims pursuant to adhesion agreements, the Papers show that the relative bargaining power of parties was a significant consideration for several of the Justices, even though the Court never developed this factor into a principled means of limiting statutory arbitration.

22. See generally STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS, SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 210 (4th ed. 2003).

23. See, e.g., COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (DUNLOP COMMISSION), *REPORT AND RECOMMENDATIONS* 25-33 (1994) (urging written arbitral opinions and expanded judicial review); National Association of Securities Dealers, News Release, *New Arbitration Rule Requires Award Explanations Upon Investor Request* (Jan. 27, 2005), at http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_013145&ssSourceNodeId=12 (approving an amendment to its procedures to require a written explanation of the arbitration panel's decision in securities industry disputes); Cole, *supra* note 21, at 1205-06 (proposing test to evaluate parties' requests for nontraditional judicial involvement).

24. See, e.g., *Gateway Tech., Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995) (implementing parties' agreement to expand the scope of judicial review); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001) (same). But see *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001) (holding that parties cannot contractually alter the FAA standard for judicial review); *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F.3d 987 (9th Cir. 2003) (same).

25. See, e.g., C. Edward Fletcher III, *Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-McMahon World*, 37 EMORY L.J. 99, 133-34, 137 (1988) (warning of creeping legalization of securities arbitration).

The sequence of cases starts in 1953 with *Wilko v. Swan*, in which the Court decided that claims brought pursuant to the Securities Act of 1933 could not be arbitrated.²⁶ Following *Wilko*, the Court did not reconsider attempts to arbitrate such claims for more than twenty years. The Court first opened the door to statutory arbitration in *Sherk v. Alberto-Culver*, an international contract case decided in 1974.²⁷ That case, however, did not generate any strong movement toward arbitrating statutory claims more generally and it was followed by an additional decade of calm. Then, beginning in the mid-1980s, the Court quickly and completely changed the legal setting for arbitration so that today there are virtually no restraints on the arbitrability of statutory claims unless Congress explicitly imposes them.

Step-by-step, over only six years, the Supreme Court eliminated restraints on the use of arbitration for disputes governed by statute. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁸ the Court held that Sherman Act antitrust claims in an international commercial context were subject to arbitration as agreed by the parties. The Court then expanded arbitration of statutory claims into the domestic context in the securities cases of *Shearson/American Express, Inc. v. McMahon*²⁹ and *Rodriguez de Quijas v. Shearson/American Express, Inc.*,³⁰ overruling *Wilko v. Swan* in the latter case. Finally, in *Gilmer v. Interstate/Johnson Lane Corp.*,³¹ the Court considered the availability of arbitration for disputes outside of a commercial setting. That decision effectively removed all statutory subject matter barriers to arbitration, holding that a claim for violation of a civil rights statute – the Age Discrimination in Employment Act (ADEA) – was subject to compulsory arbitration under the parties' arbitration agreement.³²

III. 1953: THE RULE AGAINST THE ARBITRABILITY OF STATUTORY CLAIMS

The Court's analysis began with its 1953 prohibition on arbitrating a statutory claim in *Wilko v. Swan*.³³ In *Wilko*, a purchaser of securities filed suit claiming fraud under the Securities Act of 1933 and the defendant securities brokers sought enforcement of the parties' arbitration agreement.³⁴ This raised a conflict between the United States Arbitration Act (now referred to as

26. 346 U.S. 427 (1953).

27. 417 U.S. 506 (1974).

28. 473 U.S. 614 (1985).

29. 482 U.S. 220 (1987).

30. 490 U.S. 477 (1989).

31. 500 U.S. 20 (1991).

32. See *id.* at 23.

33. 346 U.S. 427 (1953).

34. *Id.* at 428-29.

the FAA), under which courts are to enforce agreements to arbitrate disputes, and the Securities Act of 1933, which provides for judicial consideration of securities claims and prohibits waiver of its provisions.³⁵ In short, the Court held that the Securities Act invalidated the parties' arbitration agreement.

Justice Read wrote for a majority of seven Justices, with a separate concurring opinion by Justice Jackson. The Court stressed that the purpose of the Securities Act was to protect investors by requiring disclosures to securities purchasers and establishing a correlative "special right" that allows purchasers to recover for misrepresentation.³⁶ The Act provides generous filing procedures favorable to plaintiffs³⁷ and explicitly voids any stipulation waiving compliance with any of its provisions.³⁸ The securities dealer and consumer in *Wilko* had agreed to arbitrate their disputes, but the Court reasoned that they could not waive the Act's provision for a judicial forum in an arbitration agreement.³⁹ It noted that the "effectiveness" of the Act's advantageous provisions would be "lessened" if buyers must apply them in arbitration. The Court thought it significant that arbitrators "without judicial instruction on the law" make findings and issue awards without any explanation of their reasoning in a context where courts have limited power to vacate.⁴⁰

Lower courts proceeded to extend the *Wilko* holding from the 1933 Securities Act to the 1934 Securities Exchange Act, which includes an almost identical provision prohibiting waiver.⁴¹ In practical terms, this effectively ended efforts to enforce pre-dispute arbitration clauses in suits brought by

35. *Id.* at 438.

36. *Id.* at 430-31. Under § 12(2), the traditional common-law burden of proof is reversed so that sellers alleged to have misrepresented the character of the securities they sold are responsible for proving that they lacked scienter. 15 U.S.C. § 77l(2) (2000) (originally enacted as Act of May 27, 1933, ch. 38, 48 Stat. 74).

37. Plaintiffs may enforce their right in federal or state court. If they choose state court, removal is prohibited. If they choose federal court, they have broad venue choices, nationwide service of process, the amount in controversy requirement for diversity cases is inapplicable. § 22(a), 48 Stat. 86, as amended, 49 Stat. 1921, 15 U.S.C. § 77v(a).

38. § 14, 48 Stat. 84, 15 U.S.C. § 77n.

39. *Wilko*, 346 U.S. at 434-35.

40. *Id.* at 435-36. Justice Frankfurter dissented, joined by Justice Minton, on the grounds that arbitration would afford the plaintiff his full rights and that the record did not show that the plaintiff had no choice but to accept the agreement to arbitrate when he opened the brokerage account. *Id.* at 439-40.

41. *See, e.g.,* Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2d Cir. 1970); Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 246 (3d Cir. 1968); Maheu v. Reynolds & Co., 282 F. Supp. 423 (S.D.N.Y. 1967); Stockwell v. Reynolds & Co., 252 F. Supp. 215 (S.D.N.Y. 1965); Reader v. Hirsch & Co., 197 F. Supp. 111 (S.D. N.Y. 1961).

consumers under the Securities Acts.⁴² Lower courts also applied the rationale of *Wilko* beyond the context of securities litigation, holding several types of statutory claims nonarbitrable under what became known as the “public policy” exception to arbitration.⁴³ Arbitration agreements were invalidated for claims brought under the Sherman Antitrust Act,⁴⁴ RICO,⁴⁵ Carriage of Goods by Sea Act,⁴⁶ patent law, ERISA, and bankruptcy law⁴⁷ because of the public values at issue in such disputes.

IV. 1974: THE PRELUDE TO CHANGE

The issue of arbitrating statutory claims returned to the Supreme Court more than twenty years after *Wilko*, in the international case of *Scherk v. Alberto-Culver Co.*⁴⁸ In the meantime, there had been important developments in the law that acknowledged the importance of arbitration for labor and international disputes. First, the Court had decided what came to be known as the “steelworkers trilogy,” cases in which Justice William O. Douglas wrote passionately about the importance of arbitration in “promot[ing] industrial stabilization through the collective bargaining agreement” and the need to abandon the “hostility evinced by courts toward arbitration of commercial

42. *Wilko* was generally confined, however, to arbitration agreements involving investors. 346 U.S. at 435. Courts declined to extend its reasoning to invalidate arbitration agreements of stock exchange members or between securities dealers. See, e.g., *Tullis v. Kohlmeyer & Co.*, 551 F.2d 632 (5th Cir. 1977); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1213-14 (1972); *Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838, 843 (2d Cir. 1971). They also refused to invalidate securities arbitration agreements when parties waived their rights to a judicial forum with knowledge of the type of dispute after it had arisen. See, e.g., *Gardner v. Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970); *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 246 (3d Cir. 1968).

43. See, e.g., G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon*, 26 AM. BUS. L.J. 397, 404 (1988); Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 492, 503-23 (1981).

44. *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

45. *McMahon v. Shearson/Am. Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987); *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291 (1st Cir. 1986).

46. *State Estab. for Agric. Prod. Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988).

47. See Sterk, *supra* note 43, at 512-16, 521-23, 533-38 (citing patent, ERISA, and bankruptcy cases).

48. 417 U.S. 506 (1974).

agreements.”⁴⁹ Second, the United Nations had adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, in 1958. In 1970, the United States acceded to the treaty,⁵⁰ which Congress implemented by adding a second chapter to the United States Arbitration Act, renaming it the FAA.⁵¹ The Convention provides standards for judicial enforcement of arbitration agreements in international commercial contracts and for recognition of the resulting arbitral awards.⁵²

Scherk involved a breach of contract claim that included a statutory claim of misrepresentation under the Securities Exchange Act of 1934. Scherk had sold two German companies to Alberto-Culver under a contract guaranteeing the effectiveness of trademarks held by those companies and providing for arbitration of any disputes arising out of the contract.⁵³ When Alberto-Culver found flaws in the trademarks, it sued in federal court for breach of contractual warranties, and also claimed that this breach constituted fraud in violation of the Securities Exchange Act of 1934.⁵⁴ Scherk sought a stay and an order to proceed with arbitration under the parties’ purchase agreement.⁵⁵

The *Wilko* case was not directly on point: the claims in *Scherk* were brought under the 1934 Act, not under the 1933 Act as in *Wilko*.⁵⁶ Nonetheless, both statutes spring from a common purpose.⁵⁷ Like the 1933 Act, the 1934 Act

49. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *see also* *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enter. Wheel & Car Co.*, 363 U.S. 593 (1960).

50. 3 U.S.T. 2517, T.I.A.S. No. 6997.

51. 9 U.S.C. §§ 201-08 (2000).

52. Article II(1) of the Convention provides:

Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or part of any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 2(1), June 10, 1958.

53. *Scherk*, 417 U.S. at 508.

54. *Id.* at 522 (Brennan, J., dissenting).

55. *Id.* at 509 (majority opinion).

56. The 1933 Securities Act deals primarily with regulation of the sale of securities in the primary market, *i.e.*, when they are issued. The 1934 Securities Exchange Act regulates the sale of securities in the secondary market, *i.e.*, in exchanges. *See* 15 U.S.C. § 78 (2000).

57. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (“One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities . . .”).

prohibits misrepresentation and fraud,⁵⁸ contains generous venue options for plaintiffs,⁵⁹ and declares that attempts to waive its provisions are "void."⁶⁰ The international setting of the controversy, however, created policy tensions with *Wilko*'s result. Just two terms earlier in the 1972 case of *The Bremen* (which involved parties of several nationalities and an international transaction), the Court had found in favor of enforcing the parties' agreement to resolve their disputes in a particular judicial forum.⁶¹ It had stressed the importance of eliminating uncertainties regarding forum as "an indispensable element in international trade, commerce, and contracting."⁶² This practical reasoning applied equally well to the desire of parties in international transactions to be able to contract with certainty to resolve their disputes through arbitration.

The international setting won out in *Scherk*. In an opinion authored by Justice Stewart, the Supreme Court distinguished the *Wilko* case and held that, in the context of the international agreement at issue, the arbitration clause would be enforced.⁶³ The Court drew on its reasoning in *The Bremen* by analogy and described the agreement to arbitrate as "in effect, a specialized kind of forum-selection clause."⁶⁴

The Court in *Scherk* took two distinct approaches to distinguishing the *Wilko* precedent. First, Justice Stewart's opinion cited what it characterized as a "colorable argument" that the 1933 Act at issue in *Wilko* and 1934 Act at issue in *Scherk* are distinguishable.⁶⁵ This dictum, which was destined to become crucial in later decisions, stressed that section 12(2) of the 1933 Securities Act explicitly provides a defrauded purchaser of securities with a private cause of action for civil liability (referred to in the opinion as a "special right"), whereas the private right of action under section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5 is merely implied by the federal courts.⁶⁶ The Court also noted that the jurisdictional choices available to the aggrieved purchaser are narrower under the 1934 Act.⁶⁷

58. 15 U.S.C. § 78j(b) (2000). See also Securities Exchange Commission Rule 10b-518, 17 CFR § 240-10b-5 (2005).

59. 15 U.S.C. § 78aa (2000).

60. *Id.* § 78cc(a).

61. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

62. *Id.* at 13-14.

63. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974).

64. *Id.* at 519.

65. *Id.* at 513.

66. *Id.* at 513-14.

67. *Id.* at 514. While the jurisdictional provisions of the 1933 Act allow a plaintiff to bring suit "in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited," *Wilko v. Swan*, 346 U.S. 427, 431 (1953), plaintiffs with cases under the 1934 Act are limited to filing in federal district courts, which have "exclusive jurisdiction." 15 U.S.C. § 78aa (2000).

Second, the Court asserted that the two cases were distinguishable because of the circumstances of the arbitration agreements: "the respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here."⁶⁸ Those differences made the agreement in *Scherk* "truly international."⁶⁹ Hence, there would be "considerable uncertainty" about what law would apply to disputes arising out of the contract unless the arbitration provision could be enforced.⁷⁰

Justice Blackmun's notes from the Court's conference on the *Scherk* case reflect many of the Justices' differing views of the *Wilko* precedent and its importance to their interpretation of the 1934 Securities Exchange Act. Chief Justice Burger was an exception in that he did not discuss the merits.⁷¹ He called the *Scherk* case "Muddy," and suggested a "DIG", Court jargon for dismissing the case as improvidently granted. None of the other Justices took him up on this proposal and at the end of the discussion he joined the majority with the comment "now lean tow[ard] [reversal]."⁷²

Justice Douglas, the only member of the 1953 *Wilko* Court who still remained on the bench, voted to affirm the Seventh Circuit's decision against enforcing the arbitration clause. He concluded that the *Wilko* precedent was applicable because of the identical nature of the provisions protecting inves-

68. *Scherk*, 417 U.S. at 515.

69. *Id.*

70. *Id.* at 516.

71. At conference, the Chief Justice speaks first, followed by the Associate Justices in order of seniority. For ease of presentation, I do not always follow that order in discussing their comments.

72. Harry A. Blackmun Conference Notes (Apr. 29, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

Justice Blackmun used extensive and idiosyncratic abbreviations. Some of the content is obvious from the context of a case; I deduced other aspects of his abbreviations after seeing them used repeatedly in many documents. For example, *t* means *the*, *n* is a negative (usually *not*), *S* stands for *should*, and *v* indicates *of*. Abbreviations for common legal terms are also consistent, such as *AT* for *antitrust*, *OR* for *overrule*, *JD* for *jurisdiction*, and *C/A* for *cause of action*. Also, Justice Blackmun majored in mathematics at Harvard College and often used mathematical symbols in his notes. Not surprisingly, "-" means *reverse* and "+" means *affirm*. More esoterically, from algebraic proofs he adopted ":" to signify *therefore* and "≡" to indicate equivalence.

I have adopted the following conventions in conveying Justice Blackmun's notes. For ease of interpretation, I have completed his words, indicating my additions with brackets. Whenever I could not confidently interpret his handwriting I inserted [illegible]. In block quotes, I have reproduced the notes with the original punctuation and formatting intact. When quoting in text, I have inserted periods in brackets when necessary to indicate the end of a line or sentence.

tors in the 1933 Act and the 1934 Act.⁷³ Justice Brennan agreed, saying he “Cann[ot] disting[uish] Wilko as b[e]tw[een] t[he] 2 Acts[.]” Although he felt “[it] looks lousy to + [affirm,]” he concluded “Unless we O[ver]R[ule] Wilko, [we] h[a]v[e] t[o] + [affirm.]”⁷⁴

Justice Stewart, who was later assigned to author the 5-4 majority opinion permitting arbitration, spoke next. He voted to reverse, stressing the contract of the parties and its circumstances. He stated that his views were:

Strongly to t[he] contrary
 Wilko inapplic[able] here
 Arms length deal. Hold to t[he] promise⁷⁵

In addition to the nature of the agreement, Stewart found significance in what he described as “Interim happen[ing]s,” noting that the New York Convention had been incorporated as “Ch[apter] 2 of Arbit[r]ation Act.”⁷⁶ He distinguished *Wilko* as involving “adhes[ion] despite F[elix] F[rankfurter,]” who had asserted in dissent that the record in *Wilko* did not show that the purchaser had no choice when he accepted the arbitration stipulation.⁷⁷ Stewart therefore concluded that the Court “Need n[ot] O[ver]R[ule] Wilko. If a majority, [I] w[ould] join to O[ver]R[ule], but n[ot] nec[essary].”

Justice White showed a respect for the *Wilko* precedent that he later abandoned. His vote is noted as “+?,” a tentative vote for affirmance. He was “N[ot] at rest. W[ould] h[a]v[e] dissented in Wilko but accept it. Governs here.”⁷⁸ No comments are indicated for Justice Marshall, who also voted “+?.”

Justice Powell voted to reverse and emphasized the negative policy effects of any other decision: “W[ould] b[e] a disastrous preced[en]t at a bad ti[me].” In a remark directed to Douglas, Powell stated, “t[he] shock w[ould] b[e] t[he] other way – look at t[he] internat[ional] C[orporation]s.”⁷⁹ With

73. Blackmun indicates that Douglas said “§ 29a of ‘34 = § 10 of ‘33 Act & Wilco [sic].” *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Wilko v. Swan*, 346 U.S. 427, 440 (1953) (Frankfurter, J., dissenting).

78. Harry A. Blackmun Conference Notes (Apr. 29, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

79. This remark is evidence that Justice Blackmun’s conference notes are not a complete record of what transpired, for there is no indication of what Justice Douglas said about “shock.” In addition, this is the only remark directed to a specific Justice in the notes I reviewed. Otherwise the notes suggest that the Justices made their views known in the form of statements without much discussion or interchange among the group.

regard to *Wilko*, he commented, "I look at Wilko wi[th] a jaundiced eye. Get around or O[ver]R[ule] it or limit it to nat[iona]l rather [illegible] inter-nat[iona]l deals."

Then-Justice Rehnquist first passed without voting and later voted to reverse. Blackmun records him as describing himself as "Bothered," but recognizing "our pol[icy] per Wilko." He indicated he was not convinced that the incorporation of the New York Convention into U.S. law was significant to the case, saying "N[ot] sold on t[he] interim."⁸⁰

Justice Blackmun voted with the majority to reverse and enforce the arbitration agreement. His memo on the case emphasized the international business context and the absence of any disparity in bargaining power between the parties in *Scherk*.⁸¹ One can see him giving credit to arguments on both sides of the case and struggling to apply the rubric of *Wilko v. Swan*. He sought a compromise that could accommodate business interests in enforceable arbitration agreements and at the same time provide the means to effectuate the statute's public policy. Blackmun noted that section 29 of the 1934 Securities Exchange Act at issue in *Scherk* has an

anti-waiver provision identical in effect with that involved with Wilko v. Swann [sic] with respect to the 1933 Act. And in Wilko v. Swann, [sic] the Court held that a provision for stipulation was ineffective or in other words that the jurisdictional statute could not be waived. Of course in Wilko v. Swann, [sic] the Court emphasized the disparity between the security purchaser and the broker. It also emphasized that issues raised in buyer claims against brokers were not particularly well-suited to arbitration.⁸²

He saw the Court's attention to the parties' situation in *Wilko* as a line of reasoning that would, in *Scherk*, make the international setting of the contract relevant to the analysis:

80. Harry A. Blackmun Conference Notes (Apr. 29, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

81. Harry A. Blackmun Memorandum (Apr. 29, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189). This memo is typed and thus cannot be identified as the Justice's work by his handwriting, but it ends with his initials and the date. Also, it makes reference to a suggestion by "Jim," (p. 5) presumably the clerk working on the case, who would be the only other likely author of a memo on the case. The conversational tone of the memo, the fact that it is typewritten, and his penciled correction of the typographical errors in the spelling of "Swan" in the caption of the case lead me to speculate that perhaps Justice Blackmun dictated the memo.

82. *Id.* at 5.

What Wilko does suggest is that the court look to the comparative positions of the parties and the appropriateness of the forum. When one does this, we are taken to Bremen v. Zapata, where the Court recognized the growing sophistication of American businessmen in their international contacts, and the conclusion that a provision for international arbitration in a foreign port was not necessarily precluded. All of that philosophy in a sense is applicable here. Both Scherk and A[lberto]-C[ulver] were knowledgeable entities. Each was engaged in business abroad from here. One cannot assume any great disparity in knowledgeability or bargaining power.⁸³

Blackmun concluded that neither *Wilko* nor *The Bremen* was controlling and turned to policy and incentives for future disputants to decide the case:

All in all, I think Wilko can be read to support the respondent A[lberto]-C[ulver]. Bremen v. Zapata can be read to support the petitioner Scherk. And, I suspect, a good opinion can be written either way from those two cases as base points.

I am not convinced that the underlying claim here is fraud. It sounds to me more like breach of warranty. Also, it is easy, on A[lberto]-C[ulver]'s theory, to get into and remain in American courts merely by alleging a securities fraud.⁸⁴ On the other hand, if securities fraud is involved, then American policy directs the controversy into federal courts here, and that policy should not easily be circumvented.⁸⁵

Blackmun further reasoned that the courts could take public policy into account in judicial proceedings following an arbitral decision. The Court had recently taken this approach in *Alexander v. Gardner Denver Co.*,⁸⁶ in which it held that a union member claiming racial discrimination was not foreclosed from court proceedings by a prior arbitral award against him. Blackmun wrote:

On balance, I am inclined to think that the CA 7 [United States Court of Appeals for the Seventh Circuit] majority is wrong here. The federal court suit should have been stayed pending the development and resolution of the underlying arbitration. Then, when the arbitrable award is in hand, as it was in Alexander v. Denver-

83. *Id.*

84. *Id.* at 6-7. Justice Blackmun emphasized this point with a check mark in the margin.

85. *Id.* at 7.

86. 415 U.S. 36 (1974).

Gardner, the federal court would then consider whether to enforce the award or, if it felt it was contrary to our public policy or not capable by [sic] settlement by arbitration, could refuse to enforce it. This type of disposition would vindicate all the important interests.

It is to be noted that the Convention does not call for intrusion prior to arbitration. In fact the language of the Convention speaks to the contrary. This may seem like a roundabout method to resolve this dispute, but I believe it follows the pattern of the Alexander case and best gives recognition to what the parties bargain for and at the same time preserves for eventual determination and measurement the public policy of this country as expressed in the several laws.⁸⁷

Justice Blackmun's file reveals not only his own reasoning, but also something of the institutional process by which the Court's opinion developed. The Papers demonstrate that Justice Stewart sought to rely on differences between the 1933 and 1934 Acts to distinguish the *Wilko* case, but this approach did not garner the full support of the majority. As a result, it appears as dictum in the final opinion, labeled as merely a "colorable argument." Blackmun's file contains the second draft majority opinion circulated by Justice Stewart on May 29, 1974, which relied on a distinction between the two Acts as the first ground for the decision. A few days later, Justice Blackmun wrote a memo to Justice Stewart stating "the sources of [Blackmun's] difficulty" with the proposed opinion.⁸⁸ First, he addressed the section that distinguished the two Acts:

1. I suspect the benefit of the rather technical distinction you draw between the "special right" in *Wilko* and its absence in this case [discussed on pages 6-8] is marginal and does not really justify its inclusion. I am not entirely certain that I agree with the distinction. It seems to me that the implied right of action under the Court's decisions is not different from the so-called "special right" in the *Wilko* case, since the implied right adheres to Rule 10b-5 and § 10 of the Act, and is thereby included in the sweep of § 29(a). I see no apparent reason why the two are different. Even if the distinction is a proper one, you hint on page 8 that the discus-

87. Harry A. Blackmun Memorandum at 7 (Apr. 29, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

88. Letter from Harry A. Blackmun to Potter Stewart at 1 (June 4, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

sion is somewhat gratuitous. For me, it raises more questions that it answers and it seems that it is likely to pose problems in later cases in which the waiver provisions are asserted as a defense.⁸⁹

Justice Blackmun's point is drawn from a draft letter prepared by his law clerk,⁹⁰ contained in a memo to the Justice that reports:

L[ewis] F[.] P[owell] is upset with the material on pages 6-8 and thinks it is close to nonsense. His clerk tells me that he would join a suggestion to take it out, although he is so loaded with concurrences now that he does not want to take the laboring oar.⁹¹

Attached to the carbon copy of Justice Blackmun's letter is a note dated the following day from P.S. [Potter Stewart] to the members of the Court who had voted with him in conference:

After considering the suggestions contained in Harry Blackmun's thoughtful letter of yesterday, I explained to him some of my difficulties with this opinion. As the result of our conversation, it is my

89. *Id.*

90. Memorandum from JJK [James J. Knicely] to Harry A. Blackmun (June 1, 1974) (Scherk v. Alberto-Culver Co., No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189). Substantively, the Justice's letter follows the draft his clerk prepared for him. Stylistically, however, Blackmun made alterations that show his sensitivity both to his relationship with Justice Stewart and to English language usage. For example, the clerk's draft opening paragraph reads: "While I agree with the result you reach and most of the reasoning by which you get there, I do have some difficulty with a couple of points in your opinion." *Id.* In contrast, the carbon copy of Blackmun's letter reads: "While I agree with the result you reach and with most of the reasoning by which you arrive at that result, I have some difficulty at two points in your proposed opinion. I hope you do not mind too much if I venture to state the sources of my difficulty." Letter from Harry A. Blackmun to Potter Stewart at 1 (June 4, 1974) (Scherk v. Alberto-Culver Co., No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

91. Memorandum from JJK [James J. Knicely] to Harry A. Blackmun at 2 (June 1, 1974) (Scherk v. Alberto-Culver Co., No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189). This passage suggests that the workload of the Court is an institutional factor that may affect the dynamics of process by which a single Justice's opinion comes to speak for the collective. With many assigned opinions outstanding, especially toward the end of a term, the need to complete those opinions in a timely fashion might naturally cause a human being to consider priorities carefully before refusing to join a majority opinion and thus taking on the burden of writing a concurrence. This institutional factor has probably declined in significance, however, as the Court has reduced the number of cases it typically hears in a term.

understanding that he is willing to accept the changes made in this circulation as a minimally adequate response to his suggestions.⁹²

The changes demoted the distinction between the Securities Acts to a “colorable argument,” softening to the status of dictum a point that Justice Stewart initially had intended as a full-fledged rationale for the decision.

It is ironic that the passage distinguishing the Acts, which Justices Blackmun and Powell would evidently have preferred to omit, later played a key role in unraveling the *Wilko* precedent. One can speculate that if the “colorable argument” distinguishing the two statutes had been removed from the opinion instead of converted to dictum, the development of arbitration jurisprudence might have taken a different path.

It is also interesting that the Court’s opinion did not take up the difference between the bargaining power of the parties in *Wilko* and *Scherk*. This distinction was central to Justice Blackmun’s reasoning in his memo and Justice Stewart similarly stressed this point in conference, noting that the transaction in *Scherk* was an “[a]rms length deal” unlike the adhesion contract in *Wilko*.⁹³ Presumably this point did not have support of a majority although the conference notes do not indicate that any other Justices discussed the argument. The Court’s final opinion refused to limit “*Wilko* to situations where the parties exhibit a disparity of bargaining power” and asserted that it need not reach

92. Memorandum from Potter Stewart to The Chief Justice, Mr. Justice Blackmun, Mr. Justice Powell, & Mr. Justice Rehnquist (June 5, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189). The changes are indicated in Justice Blackmun’s handwriting on Stewart’s previously circulated second draft. The section beginning on page 6 that troubled Justices Blackmun and Powell read: “At the outset, it should be pointed out that even the semantic reasoning of the *Wilko* opinion does not control the case before us.” PS [Potter Stewart] 2nd draft circulated May 29, 1974, at 6 (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189). Blackmun underlined “semantic” and noted “Awk” in the margin. In the other margin, he wrote “a colorable argmt cd – made,” which tracks the language that appears in the issued opinion: “a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us.” 417 U.S. at 513. Blackmun also indicated a change on page 8 of the draft, where he put brackets around the introductory clause which read, “Even if it could be said, however,” and wrote in the margin “Acceptg t premise, however.” PS [Potter Stewart] 2nd draft circulated May 29, 1974, at 8 (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189). The final opinion reads: “Accepting the premise, however, that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934” 417 U.S. at 515.

93. Harry A. Blackmun Conference Notes (Apr. 29, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

Scherk's contention that *Wilko* should not apply to the parties' "sophisticated business" dealings because of the Court's disposition on other grounds.⁹⁴

If the Court had included the parties' equal bargaining power as a rationale for distinguishing *Wilko*, it might have developed that line of reasoning in subsequent cases.⁹⁵ Certainly Justice Stevens would have supported this rationale.⁹⁶ One can imagine a principled demarcation permitting arbitration of statutory claims when authorized by agreements that are the product of bargaining between sophisticated parties, but not permitting arbitration of these claims when pre-dispute adhesion agreements have been imposed on parties without bargaining power.⁹⁷ Under this hypothetical scenario, today's employees and consumers would not have to face the often unwelcome arbitration of their statutory claims.

Justice Blackmun's letter to Justice Stewart also suggested other changes that reflected the importance he attached to the case's international setting.⁹⁸ He proposed giving "more prominence" to the New York Convention and to the provisions of the FAA "that make the Convention a part of the law of this country."⁹⁹ He would have moved much of the discussion of the Convention from a footnote into the text, broadened it, and made it an explicit ground for the decision.¹⁰⁰ These suggestions were not incorporated, presumably for reasons discussed when Justice Stewart spoke to Justice Blackmun. In his record of this conversation, Justice Blackmun noted Justice Stewart's difficulties with resting the decision on the Convention and the FAA:

94. 417 U.S. at 512 n.6.

95. Lower courts had relied on this distinction to enforce domestic arbitration agreements among exchange members and securities brokers in the years following *Wilko*. See cases cited *supra* note 42.

96. As a Court of Appeals judge, Justice Stevens dissented in the *Scherk* case, stressing the sophistication of the parties as a factor that distinguished the case from *Wilko*. *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 615-20 (7th Cir. 1973); see also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. at 269 n.2 (Stevens, J., dissenting).

97. See, e.g., *Sterk*, *supra* note 43. The *McMahons*, relying only on *Wilko* and statutory language, later made this argument in *Shearson/American Express, Inc. v. McMahon*, but it was rejected by the majority. 482 U.S. at 230.

98. See Margaret E. McGuinness, *The Internationalism of Justice Harry Blackmun*, 70 MO. L. REV. 1289 (2005) (commenting in this symposium on Justice Blackmun's interest in international law and perspectives).

99. Letter from Harry A. Blackmun to Potter Stewart at 1 (June 4, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

100. *Id.* at 2-3. His letter refers to footnote 12, which became footnote 15 in the final opinion.

“void’ sa[me] word in Convent[io]n as in t[he] Sec[urities] Act legis[lation.] ‘legis[lative] hist[ory]’ is full of double talk[.] PS 6-4-74”¹⁰¹

As described above, Justice Blackmun’s conference notes suggest that Justice Rehnquist was not inclined to rely on the importance of the New York Convention and its incorporation into U.S. law. These views may have been developed further in correspondence among the Justices. The clerk’s memo to Justice Blackmun alludes to “WHR’s memo circulated after Conference,”¹⁰² but this memo is not included in Blackmun’s case file. Certainly the final opinion is more consistent with Justice Rehnquist’s doubts than with Justice Blackmun’s and Justice Stewart’s emphasis on the significance of international legal developments.

Justice Blackmun suggested one final insert that Justice Stewart did incorporate.¹⁰³ The language emphasizes the possibility that fraud of the type raised by Alberto-Culver under the Securities Exchange Act could be challenged in court after an arbitration, through the process for enforcing arbitral awards provided in the New York Convention. Blackmun had proposed this approach in his memo on the case as the preferable way to ensure fidelity to public policy. The promise he saw in judicial review of arbitral awards, however, has not developed. The scope of judicial review has remained exceedingly narrow, even when arbitrators decide statutory claims.¹⁰⁴

101. Justice Blackmun’s notes on conversation with Potter Stewart (June 4, 1974) (Scherk v. Alberto-Culver Co., No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

102. Memorandum from JJK [James J. Knically] to Harry A. Blackmun (June 1, 1974) (Scherk v. Alberto-Culver Co., No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

103. His suggested text was added with a few minor changes as a second paragraph to what became footnote 14 in the final opinion.

104. The standards provided in the FAA for vacating an arbitral award do not include errors of law. In dictum in the *Wilko* case, however, the Supreme Court implied that while “interpretations of the law by . . . arbitrators” are not subject to review for error in the federal courts, review for “manifest disregard” of the law is permissible. *Wilko v. Swan*, 346 U.S. at 436-37. A number of circuits have adopted this standard, but all have interpreted it very narrowly. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (manifest disregard of the law requires that “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle”); *Health Servs. Mgmt Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) (arbitrator must deliberately disregard what he or she knows to be the law); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) (award must be “(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge . . . could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact”). But see *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (stating that judicial review must be “sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law” in order to support assumptions central to the Supreme Courts’ cases permitting arbitration of statutory claims).

The institutional process illustrated in the *Scherk* case supports Judge Harry T. Edwards' assertion that judicial collegiality "allows judges to disagree freely and to use their disagreements to improve and refine the opinions of the court."¹⁰⁵ Blackmun made suggestions; Stewart made changes; and Blackmun joined an improved opinion. The Papers also suggest, however, that when an objecting Justice goes along for the sake of consensus, collegiality may also contribute to the issuance of opinions that could benefit from further improvement. It is possible that Stewart persuaded Blackmun of the merits of the draft's approach despite his reservations.¹⁰⁶ The Papers do not rule that out. But Blackmun's mere two lines describing their phone conversation make another explanation equally likely: that Blackmun's sense of collegiality may have led him to compromise and join an opinion that, while it represented the best that could be accomplished with suggestions and negotiation, may still have not been what he would have preferred.¹⁰⁷ As it happened, Blackmun's failure to insist that the "colorable argument" be removed had later unforeseen consequences.

V. 1985: INTERNATIONAL ARBITRATION OF ANTI-TRUST CLAIMS

A decade later, the Court considered its first arbitrability case since *Wilko* in which a party raised an independent statutory claim. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁰⁸ arose out of international con-

105. Edwards, *supra* note 8, at 1646. Judge Edwards limits his claims to the courts of appeals, but this form of collegiality would seem to apply to some degree in Supreme Court decisionmaking as well.

106. If so, it could be said that the reasoning in the opinion of the court reflected Justice Blackmun's "sincere" views, formed in collaboration with Justice Stewart. The following analysis of this type of collegial behavior as "a commitment to compromise and to the civility of discourse" is meant to apply in the context of voting. Evan H. Camiker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2311 (1999). It is more realistic, in my view, as a description of Justices' collegial interactions in creating court opinions:

A Justice engaged in practical reasoning might, after failing to persuade his colleagues of the correctness of his own initial views defer to their views as part of his effort to identify the correct answer on the merits. In brief, his decision to 'go along' with his colleagues may signify a humility about his own tentative judgment and an overarching commitment to the process . . . as an ongoing enterprise, in light of which individual decisions matter less than the health of the continuing enterprise as a whole.

Id.

107. This form of collegiality could be a product of strategic behavior in contrast to a sincere expression of views under the theory that "a rational judge will deviate from her personal sincere views about the law in order to secure the most desirable collective decision possible." Camiker, *supra* note 106, at 2299.

108. 473 U.S. 614 (1985).

tracts between an automobile distributor (Soler) located in Puerto Rico and Mitsubishi Motors Corporation (Mitsubishi), a Japanese motor vehicle manufacturer.¹⁰⁹ Mitsubishi brought an action seeking to compel arbitration with Soler for violations of their sales and distributorship contracts. Soler raised numerous counterclaims, among them an antitrust claim under the Sherman Act alleging that Mitsubishi and Chrysler International had conspired to divide markets in restraint of trade by prohibiting Soler from reselling vehicles it was obligated to purchase from Mitsubishi.¹¹⁰ The Supreme Court, in an opinion authored by Justice Blackmun, held that the antitrust dispute was subject to arbitration under the FAA.

According to Justice Blackmun's conference notes, much of the discussion of the case centered on statutory text and history, specifically whether Congress had provided for an exemption from the FAA that would require courts to decide antitrust claims. Chief Justice Burger, a vigorous proponent of alternative dispute resolution, is quoted as asking, "Why s[hould]n[t] [the] lang[uage] [of the] Fed[eral] Arb[itation] Act apply here? Cong[ress] [did] no[t] spell out an A[nti]T[rust] exception."¹¹¹ He also emphasized that the control that parties have over the subject matter of arbitrations obviated the need for an exception: "Att[orne]ys can easily dream up an A[nti]T[rust] cl[ause]."¹¹²

Justice Stevens, who later wrote the dissent, took a different view of the parties' agreement and focused on the limited scope (in his view) of the FAA and its stay provisions that allow arbitration to go forward in lieu of court action. He did not think the parties had anticipated arbitrating antitrust claims, finding:

merit to resp[onden]t's 1st arg[u]m[en]t.
[Illegible] p[artie]s did n[ot] contem[plate] this kind
[of] dispute as covered by t[he] ag[ree]m[en]t
also, ? whe[ther] broad st[a]y lang[uage] [of the FAA] reaches
A[nti]T[rust]. Cong[ress] c[oul]d n[ot] h[a]v[e] so intended.¹¹³

109. Mitsubishi is a joint venture between Chrysler International, a Swiss corporation, and Mitsubishi Heavy Industries, Inc., a Japanese corporation, formed with the aim of distributing cars through Chrysler dealers outside the continental United States. *Mitsubishi*, 473 U.S. at 616-17.

110. *Id.* at 618-20.

111. Harry A. Blackmun Conference Notes (Mar. 20, 1985) (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, No. 83-1569 & *Soler Chrysler-Plymouth v. Mitsubishi Motors*, No. 83-1733, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 420).

112. *Id.*

113. *Id.*

Justice White, somewhat surprisingly given his dissenting position in *Scherk*, voted to compel arbitration under the parties' contract on a statutory interpretation rationale. His comments indicate that he was aware of the inconsistency in his positions, but do little to explain his switch to support for arbitrability:

n[ot] easy
 n[ot] a fragm[en]t t[h]a[t] Cong[ress] intended to
 exclude A[nti]T[rust] cases
 N[ot] sure I w[oul]d h[a]v[e] joined Wilko.
 Noth[in]g like t[h]a[t] here, tho[ugh] I
 dissented in *Scherk*"¹¹⁴

Justice White also introduced the other main theme of the discussion as recorded in the notes by expressing a preference for an opinion governing international arbitration only: "Put off domestic situ[ation] for ano[ther] day[.]"¹¹⁵

Justices Blackmun and O'Connor voted to reverse and compel arbitration. He indicated he would, like Justice White, limit the scope of the decision, writing, "[do] no[t] decide domestic."¹¹⁶ She similarly noted that she would "limit to int[er]nat[iona]l situ[ation]" and added that "Cong[ress] may h[a]v[e] t[o] address."¹¹⁷

Justice Brennan voted against compelling arbitration, emphasizing the Court's ability to craft an exception to arbitrability for anti-trust claims despite the statutory language. He argued that an "except[i]o[n] [was] no prob[lem] in *Parker v. Brown*[.] Am[erican] Safety d[o]e[s] t[he] sa[me] th[ing] & is prob[ably] correct[.]"¹¹⁸ Brennan's first case reference on judge-made exceptions was to a Supreme Court case holding that the Sherman Act did not prohibit restraint of trade when practiced by a state.¹¹⁹ His second case reference was to a Second Circuit decision holding that the rights established by the antitrust laws were inappropriate for enforcement via arbitration because of the "pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases."¹²⁰ All the courts of appeals to

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

120. *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968).

consider the issue had adopted the Second Circuit's exception to arbitration for antitrust claims prior to the *Mitsubishi* decision.¹²¹

Justice Rehnquist, who voted with the majority to compel arbitration, observed that there was "much pomposity in [the] S[oliciter]G[eneral]'s brief."¹²² He responded to Justice Brennan's argument urging a judicially-created exception for antitrust cases by pointing out that "P[arker] v. Brown [is] n[ot] anal[ogous] bec[ause] t[h]a[t] except[i]o[n] w[en]t [to] A[nti]T[rust], n[ot] Arb[itation] act[.]"¹²³ And he indicated his willingness to limit the scope of the decision: "C[oul]d stay wi[th] int[er]nat[iona]l alone."¹²⁴

Justice Blackmun's pre-argument memo shows him considering arguments based on statutory and treaty authorities, the implications of Congressional inaction, public policy and precedent that supported both sides of the case.¹²⁵ He first remarked that the *American Safety* exception has "no support" in legislation but "is gr[oun]ded on pol[icy] [illegible]."¹²⁶ Arguing for affirmance and against permitting arbitration, he wrote that the "Am[erican] Safety exception is well entrenched[.] no c[our]t h[a]s disagreed[.] Cong[ress] h[a]s n[ot] O[ver]R[ul]ed."¹²⁷ He also noted that the New York Convention would permit an exception for antitrust cases.¹²⁸ With regard to the *Scherk* precedent, he considered that "S[cherk] can b[e] dist[in]g[ushe]d as private, n[ot] pub[lic] protect[i]o[n]."¹²⁹ But on the other hand, in *Scherk* "Arbit[rati]on [was] enf[orc]ed int[er]nat[iona]lly . . . despite [the] contrary h[o]ld[ing] in Wilko."¹³⁰ He ultimately concluded that "S[cherk] looks to a - [reversal]

121. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 655-56 (1985) (Stevens, J., dissenting).

122. Harry A. Blackmun Conference Notes (Mar. 20, 1985) (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, No. 83-1569 & *Soler Chrysler-Plymouth v. Mitsubishi Motors*, No. 83-1733, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 420).

123. *Id.*

124. *Id.*

125. Harry A. Blackmun Memorandum at 2 (Mar. 16, 1985) (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, No. 83-1569 & *Soler Chrysler-Plymouth v. Mitsubishi Motors*, No. 83-1733, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 420). Unlike the typed memo in the *Scherk* file, in this and the subsequent cases Blackmun's pre-argument memo to himself is handwritten using his characteristic abbreviations.

126. *Id.*

127. *Id.*

128. "The Convention seems, on bal[ance], t[o] contemplate sub[stantive] mat[erial] exceptions ∴ [therefore] an + [affirmance] w[oul]d n[ot] contravene t[he] Convention." *Id.*

129. *Id.*

130. *Id.*

here.”¹³¹ After writing his memo, Justice Blackmun’s preference was to decide the case on the basis of its international setting without overruling the exception from arbitration for domestic antitrust claims:

Expand Scherk to arbit[rati]on in t[he] Intern[at]ional context
Do n[ot] expand Am[erican] Safety except[i]on (domestic)
T[h]a[t] may b[e] wrong but n[ot] nec[essary] t[o] O[ver]R[ule]
it is firmly entrenched¹³²

Justice Blackmun was assigned to write in *Mitsubishi* for a 5-3 majority.¹³³ The opinion firmly endorsed arbitration in the international context and refused to recognize any difference between the arbitrability of statutory claims and contract claims.¹³⁴ The opinion emphasized the national policy favoring enforcement of arbitration agreements,¹³⁵ and concluded that Congress did not indicate an intent to exempt antitrust claims from the FAA either in the explicit terms of the Sherman Act or through its special treble damages remedy designed to encourage private enforcement.¹³⁶

Justice Stevens’ dissent signaled a switch from his opinion as a court of appeals judge in the *Sherk* case. There he had favored arbitration, while in *Mitsubishi* he opposed it. In conference, he maintained that the parties could not have intended their arbitration agreement to apply to statutory claims, but his dissent went further. There he argued that the FAA’s language encompassed claims arising out of contracts, but not those arising under federal statutes.¹³⁷ He would have drawn a line excluding both domestic and international statutory claims from arbitration entirely.¹³⁸

Justice Blackmun, in contrast, placed great weight on the international context of the business transaction. He cited the considerations that supported the Court’s decision to enforce the arbitration clause in *Scherk* and again

131. *Id.* Blackmun drew the public/private distinction from the First Circuit’s approach to distinguishing *Wilko* in the opinion below, which he described as: “Sec[uritie]s law protect[e]d indiv[idual] investors, A[n]tiT[rust] [protected] compet[iti]on itself ∴ [therefore] even in t[he] int[er]nat[iona]l context, A[n]tiT[rust] issues [are] for t[he] c[our]ts.” *Id.* at 1.

132. *Id.* at 3.

133. Justice Powell abstained. Justices Brennan, Marshall, and Stevens dissented. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616 (1985).

134. The majority opinion states: “There is no reason to depart from these guidelines [resolving doubts about arbitrability in favor of arbitration] where a party bound by an arbitration agreement raises claims founded on statutory rights.” *Id.* at 626.

135. *Id.* at 627 (citing *Southland Corp. v. Keating*, 461 U.S. 1, 15 & n.7 (1984)).

136. *Id.* at 628, 634-35.

137. *Id.* at 646-50 (Stevens, J., dissenting).

138. His positions were consistent in that he saw the *Scherk* case as a contract claim on the other side of that line. *Id.* at 646-47.

analogized arbitration clauses to the forum-selection clause enforced in *The Bremen*.¹³⁹ This theme also featured prominently in the script he prepared for his announcement of the opinion:

Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even if one assumes that a contrary result would be forthcoming in a domestic context.¹⁴⁰

Thus it was reasonable to interpret the Courts' decisions in *Scherk* and *Mitsubishi*, as some did, to draw a line between arbitrating statutory claims in international arbitrations and in domestic arbitrations, confining the holdings permitting the arbitration of statutory claims to the international context.¹⁴¹

Finally, the file provides a glimpse of Justice Blackmun and Chief Justice Burger's relationship which had by all accounts thoroughly deteriorated at this point.¹⁴² At the end of Blackmun's opinion he laid down a challenge for domestic courts that included a comment on judicial acceptance of alternative dispute resolution, a cause Burger had championed:

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. . . . Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national

139. *Id.* at 629-31 (majority opinion).

140. Harry A. Blackmun Memorandum at 2 (July 2, 1985) (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, No. 83-1569 & *Soler Chrysler-Plymouth v. Mitsubishi Motors*, No. 83-1733, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 420).

141. *See, e.g., Newman v. Shearson, Hammill & Co., Inc.*, 383 F. Supp. 265, 268 (W.D. Tex. 1974) (concluding that *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), "carved out a narrow exception to the *Wilko* holding, and is applicable only to international transactions").

142. *See, e.g., LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN* 122 (2005) ("The strains between Harry Blackmun and Warren Burger intensified with each passing term. . . . By the 1980s, the gap between them would be all but unbridgeable.").

courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.¹⁴³

This passage prompted the Chief Justice to offer a suggestion when he joined the opinion. In a letter headed "PERSONAL," with that notation underscored again by hand, Burger wrote:

Dear Harry:

I join but I wonder if the last 8 lines on page 23 of the text doesn't reflect the "old" rather than the current judicial attitude toward arbitration. All of our cases in recent decades give wide latitude to arbitration as you note on page 16, and other references to the Bremen and Scherk show our hospitality toward alternative means of dispute resolution.

Why not make it something along the following lines:

The holdings of this and other courts show the trend to "shake off the old judicial holding [sic] . . . etc."

In short, "give the dog a good name" and it is more likely to live up to it!¹⁴⁴

There is no indication of any response from Blackmun and he left his language intact.

VI. 1985: BYRON R. WHITE "UNSETTLES" THE DOMESTIC "BOAT"

During the same term as *Mitsubishi*, the Court decided *Dean Witter Reynolds, Inc. v. Byrd*,¹⁴⁵ a unanimous decision with an opinion authored by Justice Marshall. The case concerned how arbitrable claims joined with nonarbitrable claims should be treated. The opinion is primarily of interest because Justice White used it to prod changes in the law of securities arbitration. By casting doubt on the previously well-settled application of *Wilko* to the 1934 Securities Exchange Act, he stirred up controversy in the lower courts in order to present the issue to the Supreme Court.

143. *Mitsubishi*, 473 U.S. at 638-39 (citations omitted).

144. Memorandum from Justice Warren E. Burger to Justice Harry A. Blackmun (June 24, 1985) (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, No. 83-1569 & *Soler Chrysler-Plymouth v. Mitsubishi Motors*, No. 83-1733, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 420).

145. 470 U.S. 213 (1985).

The case resolved a circuit split. A number of the courts of appeals had endorsed the "doctrine of intertwining," which allowed district courts to exercise their discretion to try all the parties' claims, both arbitrable claims and non-arbitrable statutory claims, together in federal court when all the claims were closely related.¹⁴⁶ In contrast, other courts of appeals had held that district courts had no such discretion and must compel arbitration of the arbitrable claims.¹⁴⁷ The Court agreed with the latter group, deciding that despite the resulting inefficiency, the arbitrable claims must be severed and sent to arbitration.¹⁴⁸ It reasoned that Congress's primary aim when it enacted the FAA was to enforce arbitration agreements rather than to promote efficiency.¹⁴⁹

The case concerned claims under the 1934 Securities Exchange Act but the decision was narrow. Byrd, the securities purchaser who opposed arbitrating his claims, had not raised the issue of his unequal bargaining power in entering the parties' agreement to arbitrate.¹⁵⁰ Moreover, although the Court in *Scherk* had held that claims brought under the 1934 Act were arbitrable in international agreements, the question of their arbitrability in domestic disputes was not before the court in *Byrd*. Dean Witter, which had sought arbitration of the other claims raised by the plaintiff, had not tried to arbitrate the 1934 Act claims because it assumed arbitration in the domestic context was precluded by *Wilko*,¹⁵¹ an assumption grounded in the decisions of the lower courts.¹⁵²

The analysis in Justice Blackmun's memo on the case reveals the importance he placed on distinguishing the *Wilko* precedent and his concern with the practical "real world" effects of the Court's decision:

I think I w[oul]d – [reverse]

1. The bifurcat[i]o[n] gives effect to both fed[eral] Acts, 1934 & Arb[itation] Act
2. Wilko went off on a X [conflict] b[e]tw[een] 2 fed[eral] stat[ute]s
3. This is a X [conflict] b[e]tw[een] [the] Arb[itation] Act & a judic[ially]-made intertwin[i]ng doc[trine]
4. True, bifur[cation] is > [more] expens[i]v[e],¹⁵³ but t[he] stat[ute] cuts t[h]a[t] way

146. *See id.* at 216-17.

147. *Id.* at 217.

148. *Id.*

149. *Id.* at 218-21.

150. *Id.* at 216 n.2.

151. *Id.* at 215.

152. *See supra* note 43.

153. At this point, Justice Blackmun inserted between the lines another disadvantage of bifurcation: "& delays—if th[ere] is a stay."

5. Weak fed[eral] cl[aim]s can b[e] asserted t[o] defeat [the] Arb[itation] Act & its pol[icies]¹⁵⁴

6. Why S[hould] arbit[rati]on b[e] stayed? Can we n[ot] protect vs [against] C[ollateral] Est[oppel]?¹⁵⁵

At the Conference, the Justices appear to have agreed easily on bifurcation, with most of the discussion centering on whether arbitration of the state law claims should be stayed while the Securities Exchange Act claims were tried, or allowed to proceed with the risk of undermining the federal courts' exclusive jurisdiction over those claims.¹⁵⁶

Chief Justice Burger voted to reverse the holding below and seemed to regard inefficiency as a necessary, if unfortunate consequence of bifurcation. The notes record him as indicating "splitt[ing] — > so ineffic[ient.] we so recog[nize]d in *Moses Cone*."¹⁵⁷ Justice Brennan agreed that the claims should be bifurcated, reasoning "fed[eral] pol[icy] favors arbit[rati]on — *Cone*["¹⁵⁸ He raised the question of "whe[n] arbit[rati]on s[hould] b[e] stayed?" and commented that the Court "may n[ot] h[a]v[e] t[o] reach" the issue under the procedural posture of the case.¹⁵⁹ He also appears to have questioned *Wilko*'s relevance to the case: a curt "*Wilko*?" appears in Blackmun's notes.¹⁶⁰

Justice White commented that he was "wi[th] W[illiam] J[.]B[rennan]" and answered that they should "say *Wilko* [is] n[ot] applic[able] her[e]."¹⁶¹ He voiced strong opposition to staying the arbitration, asserting:

St[ate] law cl[aim]s [a]r[e] arbit[rable] & arb[itation] S[hould] proceed
W[oul]d n[ot] stay t[he] arbit[rati]on — let it go ahead

154. There is a check mark in the margin beside this comment.

155. Harry A. Blackmun Memorandum (Nov. 11, 1984) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

156. Harry A. Blackmun Conference Notes (Dec. 7, 1984) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

157. "*Moses Cone*" refers to *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in which the Court affirmed an order enforcing an arbitration agreement, even though it would result in bifurcated proceedings, saying that "federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 20.

158. Harry A. Blackmun Conference Notes (Dec. 7, 1984) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

159. *Id.*

160. *Id.*

161. *Id.*

D[ean] W[itter] wants t[o] avoid puni[tive] dam[age]s
in fed[eral] c[our]t¹⁶²

Justice Marshall is shown as voting in favor of bifurcation, that is, to reverse, but made no comments.¹⁶³ Justice Blackmun agreed with this vote, recording that he was “wi[th] B[rennan]-W[hite]-M[arshall]” and that “Wilko [does] n[ot] apply.”¹⁶⁴ Justice Powell also thought it was “OK to bifurcate.”¹⁶⁵ With regard to the question of staying arbitration for the judicial proceeding, he added that it would be “Best if both proceed tog[ether].”¹⁶⁶

Justice Rehnquist is recorded as also voting to reverse, saying “Wilko a loser.”¹⁶⁷ Justice Stevens noted “I h[a]v[e] doubts ca [about] Wilko.”¹⁶⁸ On the issue of the stay, he recommended that they “Try t[o] finesse t[he] timing [of] t[he] arbit[rati]on-cases mite [might] differ[.] arb[itation] S[hould] n[ot] auto[matically] b[e] stayed[.] do n[ot] b[e] too rigid on t[he] arbit[rati]on[.]”¹⁶⁹

Justice O’Connor concluded the discussion by raising the tricky question of preclusion in bifurcated procedures: “C[oul]d [the] D[istrict] C[our]t h[a]v[e] dism[issed] [the] St[ate] cl[aim]s at [the] start? Let both proceed[.] Arbit[rati]on S[hould] n[ot] h[a]v[e] preclusive effect but need n[ot] decide this here.”¹⁷⁰

Justice Marshall was assigned the *Byrd* opinion and after he circulated the first draft, Justice O’Connor continued the conversation about preclusion in the form of a memo. Her request for changes illustrates the careful word-smithing that colleagues on occasion contribute, both to improve clarity and in order to narrow an opinion of the Court so that it is not inconsistent with their views:

Dear Thurgood,

I think that your draft opinion does a fine job of resolving this case, and I agree with its analysis and conclusion. However, I have two minor concerns with the draft as currently written. First, the draft opinion on page 9 observes that “it is far from certain that arbitration proceedings will have any preclusive effect on subsequent federal court actions.” This statement seems rather broad, because

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

arbitration generally will have preclusive effect with respect to claims that are properly arbitrable. The Arbitration Act provisions for confirmation of an arbitration award absent specified grounds for vacating or amending the award, 9 U.S.C. §§10, 11, suggest this conclusion. Consequently, I think it would be preferable for the sentence to conclude “. . . any preclusive effect on the litigation of nonarbitrable federal claims.”

My second concern relates to the second paragraph on page 10, which states that “though the formulation of rules of preclusion and nonpreclusion, courts may directly and effectively protect federal interests.” As your draft opinion indicates, page 9, this statement applies in situations where the Full Faith and Credit Statute, 28 U.S.C. §1738, is inapplicable because there are no prior state judicial proceedings. Of course, where §1738 applies, our previous decisions, *e.g.*, Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-482 (1982), indicate that federal courts are not free to employ their own preclusion rules. To avoid any confusion in this regard, and any apparent inconsistency between Byrd and the Court’s opinion in Marrese v. American Academy of Orthopaedic Surgeons, No. 83-1452, I am hoping you will change the first sentence in the second paragraph on page 10 to read something along the lines that: “McDonald establishes that courts may effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding.”

If you could accommodate these two concerns, I would be happy to join your opinion.¹⁷¹

Justice Marshall did make both these changes.¹⁷² Further discussion then followed among the justices on whether district courts should stay arbitration in cases with bifurcated claims. Marshall’s second draft of the opinion included guidance for district courts in its penultimate paragraph:

As a result, there is no reason to require that district courts decline to compel arbitration, or manipulate the ordering of the resulting bifurcated proceedings, simply to avoid an infringement of

171. Memorandum from Justice Sandra Day O’Connor to Justice Thurgood Marshall (Jan. 14, 1985) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

172. See Dean Witter Reynolds, Inc., v. Byrd, 470 U.S. 213, at 222-23 (1985); Justice Thurgood Marshall to Justice Sandra Day O’Connor (Jan. 14, 1985) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

federal interests. Instead, after granting a motion to compel arbitration a district court should consider what ordering of arbitration and securities litigation "will produce the quickest, soundest resolution of the complete controversy between the parties," and only thereafter—if necessary—should it resolve what weight shall be given to the arbitrator's findings.¹⁷³

Justice White responded, urging Marshall to reject explicitly the possibility of a stay of arbitration pending trial in bifurcated cases:

Dear Thurgood,

I had thought that the conference vote was to indicate not only that the arbitrable issues could be split off and arbitrated but also that normally arbitration should go forward and not be stayed pending trial of the securities claims. In the next to the last paragraph of your circulating draft, you seem to give the trial judge open-ended discretion to stay arbitration, and I'm quite sure that there are those judges who will routinely stay such proceedings. This would frustrate the speedy resolution of issues that the parties have agreed to arbitrate. Of course, it may be that a majority of the Court feels otherwise. If that is the case, I shall write briefly against that view. Otherwise, I join your draft.

In any event, I plan to add a few lines with respect to Wilco v. Swann [sic].¹⁷⁴

Justice Marshall did not go as far as White requested; the contents of the file indicate that only two other Justices penned notes in support of rejecting a stay of arbitration outright.¹⁷⁵ Justice Marshall did, however, trim the opinion,

173. 2nd Draft at 10-11 (Jan. 15, 1985) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421) (quoting *University Life Insurance Co. of America v. Unimarc Ltd.*, 699 F.2d 846, 851 (7th Cir. 1983)).

174. Memorandum from Justice Byron White to Justice Thurgood Marshall (Jan. 16, 1985) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421). The file also contains a gentle note from Justice Rehnquist reminding Marshall and White that "'Wilco' is spelled with a 'k,' not with a 'c.'" Memorandum from Justice William H. Rehnquist to Justice Thurgood Marshall & Justice Byron White (Jan. 16, 1985) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

175. Justice Blackmun's file contains memos from Justices O'Connor and Blackmun voicing support for Justice White's suggestion to express the position "that generally the arbitration should go forward pending the trial." Memorandum from Justice

removing the language that would have acknowledged the trial judge's discretion to grant the stay. Only the first sentence of the objectionable paragraph appears in the final opinion of the Court.¹⁷⁶

It is the "few lines" that Justice White wrote in his separate concurrence that make the case significant for arbitration of statutory claims, for they undermined long-standing assumptions on the reach of *Wilko*. He stated that the "premise" of the case, that Byrd's claims under the 1934 Act were not arbitrable, "is a matter of substantial doubt."¹⁷⁷ Justice White acknowledged *Wilko*'s holding that arbitration agreements are not enforceable for 1933 Act claims, but stressed, "*Wilko*'s reasoning cannot be mechanically transplanted to the 1934 Act."¹⁷⁸ In support of this contention, he offered only *Scherk*'s "colorable argument" dictum, concluding with the comment that he was "reiterat[ing these reservations] to emphasize that the question remains open, and the contrary holdings of the lower courts must be viewed with some doubt."¹⁷⁹

The effect of Justice White's doubt was predictable. Parties began to seek arbitration of claims brought under the Securities Exchange Act of 1934 and, citing White's opinion, some courts of appeals seized upon his recycled dictum and reversed their prior stance.¹⁸⁰ Others continued to reject the arbitrability of 1934 Act claims,¹⁸¹ creating a circuit split for the Court to resolve.

VII. 1987: DOMESTIC ARBITRATION OF 1934 SECURITIES EXCHANGE ACT AND RICO CLAIMS

As a result of Justice White's concurrence, the question of arbitrability was back at the Court within two years after *Byrd* in the case of *Shearson/American Express, Inc. v. McMahon*.¹⁸² For the first time since *Wilko* a

Sandra Day O'Connor to Justice Thurgood Marshall (Jan. 16, 1985) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421); *see also* Memorandum from Justice Harry A. Blackmun to Justice Thurgood Marshall (Jan. 18, 1985) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

176. *Dean Witter Reynolds*, 470 U.S. at 223.

177. *Id.* at 224 (White, J. concurring).

178. *Id.*

179. *Id.* at 225.

180. *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 296 (1st Cir. 1986); *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1398 (8th Cir. 1986).

181. *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197, 1202-03 (3rd Cir. 1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59, 60 (5th Cir. 1986); *Sterne v. Dean Witter Reynolds, Inc.*, 808 F.2d 480, 483 (6th Cir. 1987); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520, 527 (9th Cir. 1986); *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032, 1036 (11th Cir. 1986).

182. 482 U.S. 220 (1987).

case squarely raised the issue of arbitrating statutory claims in the domestic commercial context. Because the investors in *McMahon* were customers of a brokerage firm, the case nominally presented the arbitrability issue in the consumer context, but the facts did not dramatize the issue of unequal bargaining power.¹⁸³ Blackmun's conference notes do not disclose any discussion of this issue. The discussion he recorded primarily concerned the *Wilko* precedent and whether or not it was possible to distinguish between arbitrability under the 1934 Act at issue in *McMahon* and the 1933 Act that had been at issue in *Wilko*.

Many of the Justices phrased their position in terms of their views of *Wilko* and whether or not the Court should overrule it. Chief Justice Rehnquist voted in favor of arbitrability (to reverse), commenting that he was "wi[th] B[yron] R[.]W[hite] in Byrd" and that he saw "no need to O[ver]R[ule] Wilko[.]"¹⁸⁴ Justice White was reciprocally "wi[th] [the] C[hief] J[ustice.]"¹⁸⁵ He declared that he was "n[ot] a fan [of] Wilko," but the Acts "can b[e] dist[i]ng[ui]shed," and that he "w[oul]d n[ot] O[ver]R[ule] Wilko, tho[ugh] wrong[.]"¹⁸⁶ Justice O'Connor joined them in voting to reverse, but indicated that she was "n[ot] all at rest."¹⁸⁷ She thought, however, that the "S[olicitor] G[eneral]'s posi[tion] is a reas[onable] one[.]" confine *Wilko* to '33 Act - [do] no[t] O[ver]R[ule] it & [do] no[t] extend it."¹⁸⁸ Justice Powell thought that "to-day *Wilko* w[oul]d b[e] decided otherwise[.] Wilko based on suspicion [of] arbitration."¹⁸⁹ Justice Scalia agreed with O'Connor on the merits of the Solicitor General's position, but had harsh words for *Wilko*'s precedential value:

Wilko a p[o]w[e]r grab & bad deci[sion]
limit it t[he] way [the] S[olicitor] G[eneral] suggests
[Do] no[t] O[ver]R[ule] Wilco[sic]."¹⁹⁰

183. In district court, the *McMahons* argued that the arbitration provision in the agreement they signed was not enforceable because it was a contract of adhesion. *McMahon v. Shearson/American Express, Inc.*, 618 F. Supp. 384, 386 (S.D. N.Y. 1985). The court rejected this argument as "wholly unconvincing," observing that "given plaintiffs' sizeable investment, there is nothing to indicate that they were without bargaining power." *Id.* The court of appeals found no reason to overturn the district court's finding that there was a valid agreement to arbitrate. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 99 n.6 (2d Cir. 1986).

184. Harry A. Blackmun Conference Notes (Mar. 6, 1987) (*Shearson/American Express v. McMahon*, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

The Solicitor General had submitted a brief on behalf of the Securities & Exchange Commission (SEC), which was in a delicate position. It wanted the Court to permit arbitration of 1934 Act claims, but it did not want a decision endorsing *Scherk*'s distinction between the 1933 Act's express right of action and the 1934 Act's implied right. It feared this rationale would weaken the implied right, a consequence that would be "destructive of investor protections under the securities laws."¹⁹¹ To avoid this result, the SEC proposed distinguishing *Wilko* without contrasting the two Securities Acts. It argued that in *Wilko* the parties' arbitration agreement ran afoul of the prohibition on waiving compliance with the 1933 Act's provisions only because the Court regarded arbitration at the time as an inadequate substitute for the judicial forum provided by the Act.¹⁹² The SEC contended that its authority to regulate arbitration in the securities industry remedied this inadequacy and therefore meant that arbitration under pre-dispute agreements between brokers and investors should no longer be viewed as prohibited.¹⁹³

Only Justices Powell, Brennan, and Stevens compared the two Acts during conference. Powell agreed with the SEC's conclusion but disagreed with its rationale:

yes, [there is a] dif[ference] in lang[uage] b[e]tw[een] t[he] 2 Acts
34 Act h[a]s noth[in]g [as] ful[l] ca [with regard to]
J[uris]D[iction]
t[he]r[e] is a dif[ference] b[e]tw[een] [an] express & implied
c[ause of]/a[ction]¹⁹⁴

Justice Brennan took the contrary position on the relationship between the two Acts, stating that the 1934 Act claims were "n[ot] arbit[rable.]" and that there was "no dist[inctio]n b[e]tw[een] [the] 33 and 34 Act[s.]"¹⁹⁵ Justice Stevens agreed, commenting that he saw "no dif[ference] b[e]tw[een] express, implied c[ause of]/a[ction.]"¹⁹⁶

According to Blackmun's notes, only Justice Stevens raised the issue of implied congressional approval of *Wilko* during the conference discussion,

191. Brief of the SEC as Amicus Curiae Supporting Petitioners at *7, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (No. 86-44).

192. *Id.* at 10.

193. *Id.* at 18-19.

194. Harry A. Blackmun Conference Notes (Mar. 6, 1987) (*Shearson/American Express v. McMahon*, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

195. *Id.*

196. *Id.*

although the topic was later featured in both the majority opinion and the dissents.¹⁹⁷ Stevens stated he

w[oul]d h[a]v[e] V[oted] t[he] other way in Wilko
- t[he] law for 35 y[ea]rs
Cong[ress] h[a]s n[ot] ch[an]g[ed]¹⁹⁸

Stevens was uncomfortable with the Court's activist role and insisted that any change in policy should be in the hands of Congress:

B[yron] R[.]W[hite] unsettled t[he] boat
Let Cong[ress] ch[an]g[e], if t[he]y want
[The] SEC looks bad¹⁹⁹

Justice Blackmun voted to affirm. This was the case in which he moved from endorsing to opposing arbitration of statutory claims. His pre-argument memo makes clear that his change in position was principled, not mercurial. He laid out his rationale for concluding that *Wilko*'s reasoning retained its vitality and applied as well to the 1934 Act. In the process, he again objected to *Sherk*'s treatment of the 1934 Act, renewed in Justice White's concurrence in *Bryd*, writing "P[otter]S[tewart] ignores t[he] policy rationale behind Wilko - t[he] prot[ectio]n [of] investors[.] this policy is =ly [equally] pres[en]t in t[he] '34 Act[.] Difference] b[e]tw[een] express & implied

197. See *Shearson*, 482 U.S. 220 at 234-38, 246-48 (Blackmun, J., dissenting), 268 (Stevens, J., dissenting).

198. Harry A. Blackmun Conference Notes (Mar. 6, 1987) (Shearson/American Express v. McMahon, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

199. *Id.* The SEC maintained that the 1975 amendments to the Exchange Act, which altered some aspects of securities arbitration but did not change the status quo under *Wilko* for pre-dispute agreements between brokers and consumers, was not an endorsement of the long-standing *Wilko* precedent but instead a way to leave the question of arbitration of securities claims for further development by the courts. Brief of the SEC as Amicus Curiae Supporting Petitioners at *18-19 & n.14, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (No. 86-44).

On its face, the legislative history of the 1975 amendments arguably supported Justice Stevens' position. According to the conference report, the amendments "did not change existing law, as articulated in *Wilko v. Swan* . . . , concerning the effect of arbitration proceeding provisions in agreements [between brokers and consumers]," H.R. Rep. 94-229, 94th Cong. 1st Sess. 111 (1975). *But see* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 91-94 (1994) (arguing that although there were grounds to decide that *Wilko*'s holding should be extended to the 1934 Act, courts should not read the language of the conference report as a reliable endorsement of that extension).

C[ause of]/A[ction] is irrel[evant] – both exist.”²⁰⁰ He was comfortable in distinguishing the case from *Mitsubishi*, where he had authored the opinion, commenting “but t[h]a[t] internat[ional].”²⁰¹

In addition to their Securities Exchange Act claims, the McMahons also raised RICO claims, which the Justices easily found to be arbitrable. Justice Powell was the only Justice who expressed any sympathy for excepting these claims from arbitration.²⁰² He initially voted to affirm that part of the case and indicated that “RICO [i]s quasi-crim[inal] & sh[oul]d n[ot] b[e] arbit[rable.]” The notes show that he later changed his vote, making the vote to reverse on the RICO claims (and thus approve arbitrability) unanimous. Blackmun’s conference notes provide no indication of his reasoning.²⁰³

The ease with which the Court found the RICO claims arbitrable dispelled any hopes that the Court might draw a categorical line permitting arbitration of statutory claims in international arbitrations but not in the domestic setting. The analysis was no longer focused on the circumstances of the agreement, as it had been in *Scherk* and to a great extent in *Mitsubishi*, where the Court had emphasized the capacities of international parties and the needs of international business. In *McMahon*, the Court looked for limits on arbitrability in the substantive statutes that provided the parties’ claims, assuming that arbitrability was otherwise mandated by the FAA.

With regard to *Wilko*, the 5-4 majority adopted the approach advocated by the SEC and Solicitor General. The Court decided that “*Wilko* must be understood . . . as holding that the plaintiff’s waiver of the ‘right to select the judicial forum’ was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2).”²⁰⁴ With this weak interpretation of *Wilko*, the handwriting of its demise was on the wall.

In dissent, Justice Blackmun refused to accept this characterization of *Wilko* and stressed the goal of both the 1933 and 1934 Acts to protect purchasers of securities because of their relatively weak position in the marketplace.²⁰⁵ The “real world” importance of this concern to Justice Blackmun is illustrated by a letter he preserved in the file on the case. It is a copy of a let-

200. Harry A. Blackmun Memorandum at 2 (Mar. 1, 1987) (Shearson/American Express v. McMahon, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

201. *Id.*

202. Justice Blackmun’s memo on the case commented on the RICO claims that “This [is] a tail to t[he] dog & thrown in.” *Id.* He later added (in different pencil) that he did “no[t] feel strongly on this one.” *Id.*

203. Blackmun added “w[oul]d – [reverse] on this” in lighter pencil at the end of the entry on Powell’s comments. Harry A. Blackmun Conference Notes (Mar. 6, 1987) (Shearson/American Express v. McMahon, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

204. 482 U.S. at 228-29 (citations omitted).

205. *Id.* at 243 (Blackmun, J., dissenting).

ter to Justice O'Connor from Forrest Darby, an electrician, expressing concern about the National Association of Securities Dealers arbitration of his elderly mother's claim concerning the investment of her \$15,000 life savings, which had been placed in a risky oil and gas partnership. The point of the letter can be summed up in the postscript: "P.S. I don't know how my mother's case is going to come out but the ground rules are much more slanted than I thought they were when we began this action."²⁰⁶ A hand written cover sheet addressed to Justice Blackmun reads: "I read your dissenting opinion in *Shearson v. McMahon*. As usual you were on the compassionate, noble side of an issue."²⁰⁷

Protecting the weaker party from unwanted arbitration had also become more difficult under other Supreme Court arbitration cases. By the time of the *McMahon* dissent, the Court had closed the door to an interpretation of the FAA that could have permitted states to pass laws preventing arbitration based on adhesion contracts. In *Southland Corporation v. Keating*,²⁰⁸ the Court had decided that the FAA applies in state court and preempts state law, with the result that states were then unable to implement substantive policies limiting arbitrability.²⁰⁹ It was this development, coupled with these cases on arbitration of statutory claims, that led to the commonplace determination of public values embodied in legislation through the means of private arbitration.

In terms of Justice Blackmun's decisionmaking, the *McMahon* case provides an opportunity to examine the criticism that he relied too heavily on the judgment of his law clerks.²¹⁰ The file contains the clerk's bench memorandum,²¹¹ which permits a comparison with Blackmun's pre-argument memo.

206. Letter from Forrest Darby to Justice O'Connor at 2 (Aug. 8, 1987) (Shearson/American Express v. McMahon, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

207. Letter from Forrest Darby to Justice Blackmun (Aug. 8, 1987) (Shearson/American Express v. McMahon, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

208. 465 U.S. 1 (1984).

209. Justice Stevens dissented, *id.* at 17-21, based on the clause in § 2 of the FAA that permits a party to revoke an agreement to on "such grounds as exist at law or in equity for the revocation of any contract." The majority held that this clause referred only to grounds for revocation that apply to all contracts. *Id.* at 16 n.11. Thus a state would have to bar enforcement of all adhesion contracts if it wanted to permit parties to an adhesion agreement to revoke the arbitration clause.

210. See, e.g., David Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS (May 2005). But see Readers Respond: Justice Blackmun, http://www.legalaffairs.org/issues/May-June-2005/feature_response_mayjun05.msp (letters from Seth Waxman & William Alden McDaniel, Jr.).

211. Memo from [James] Fanto to Harry A. Blackmun (Mar. 1, 1987) (Shearson/American Express v. McMahon, No.86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

His memo also makes clear that Blackmun's views on the case were his own. The justice clearly read the clerk's memo carefully: he placed check marks in the margin of the clerk's memo next to points he found particularly relevant. His own memo included some of those checked points, but they were distilled into an independent analysis. Notably, his reactions to arguments in the case were recorded in personal decisional terms. For example, he wrote "Improvement in arbitral routine d[oe]s n[ot] carry t[he] da[y] for me."²¹² The comparison between memos supports what Blackmun's law clerks knew from experience: while his decisional analysis might have been informed by a clerk's reasoning, it was in no way determined by it.²¹³ Furthermore, Blackmun's memos in general provide physical evidence that he used them as a thinking aid; the markings on the originals suggest that he even returned to them and recorded additional thoughts as he considered the case. They are a testament to Justice Blackmun's diligence and to the integrity he brought to his work.

VIII. 1989: "BRW RIDES HIGH!" – *WILKO* OVERRULED TO MAKE 1933 SECURITIES ACT CLAIMS ARBITRABLE

Two years later, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,²¹⁴ the Court officially overruled *Wilko v. Swan*, erasing any distinction between arbitrability under the 1933 and 1934 Acts and authorizing arbitration of securities claims brought under either Act. Although the decision on the 1934 Act in *McMahon* had been based on the rationale that the two Acts were significantly different, the Court now decided that those differences were irrelevant, thus making arbitration acceptable for 1933 Act claims.

The discussion at the Justices' conference appears to have been perfunctory, with many of the comments concerning whether the ruling would apply retroactively to the case despite the change in the law.²¹⁵ On the merits, Chief Justice Rehnquist voted to affirm and stated the issue as "S[hould] Wilko b[e] O[ver]R[ule]d?"²¹⁶ His answer was that "W[ilko] h[a]s only stare deci[cis] g[oin]g for it[.] I w[oul]d O[ver]R[ule]."²¹⁷ Justice White observed that he

212. Harry A. Blackmun Memorandum at 2 (Mar. 1, 1987) (*Shearson/American Express v. McMahon*, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 427).

213. See, e.g., Readers Respond: Justice Blackmun, http://www.legalaffairs.org/issues/May-June-2005/feature_response_mayjun05.msp (letter from David W. Ogden).

214. 490 U.S. 477 (1989).

215. Harry A. Blackmun Conference Notes (Mar. 29, 1989) (*Rodriguez de Quijas v. Shearson/American Express*, No. 88-385, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 534).

216. *Id.*

217. *Id.*

had been “on record a long ti[me]. W[ilko] all but dead anywa[y.]”²¹⁸ Justice O’Connor resisted the pull of the facts in the case and also voted to compel arbitration: “[t]he[se] πs [plaintiffs] pathetic[.] yet O[ver]R[ule] Wilko.”²¹⁹ Justice Kennedy also voted to affirm, noting that this was a matter of “us O[ver]R[uling] our own cases.”²²⁰ Justice Scalia joined this majority, although he noted the tension with the fact that *McMahon* had distinguished the treatment of arbitration in the two statutes: “rationale [of] McMahon leads me[.] But satis[fied] we can leave an inconsist[en]cy in t[he] law.”²²¹

In conference, Justices Marshall, Blackmun, and Stevens voted to block arbitration by reversing.²²² Justice Stevens characteristically commented that he would “let Cong[ress] fix it up.”²²³ Justice Blackmun’s memo on the case predicted correctly that the “C[our]t w[il]l + [affirm].”²²⁴ He struggled with how to reconcile his view that the Court should defer to Congress and maintain *Wilko* with the countervailing desirability of adhering to the newly-created *McMahon* precedent:²²⁵

I think Cong[ress] S[hould] act wi[th] so many y[ea]rs gone by –
on [illegible] & A[nti]T[rust]

True, wi[th] McM[ahon], a split b[e]tw[een] ‘33 & ‘34. T[h]a[t] is
n[ot] good.

But McM[ahon] is error. Do we compound it[?]

We trench on Cong[ress]’ territory.

The reliance on integ[rity] [of] sec[ur]e arbit[r]ation may b[e] a thin
reed.

Look at what g[oe]s on – just want to lighten c[our]ts’ B.²²⁶

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. Justice Brennan is indicated as abstaining, or perhaps in this case “abs” means absent, for he later joined the dissent.

223. *Id.*

224. Harry A. Blackmun Memorandum (undated) (Rodriguez de Quijas v. Shearson/American Express, No. 88-385, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 534).

225. Justice Blackmun faced the dilemma of deciding which precedent he should honor, a problem created when judges differ over time or on a multi-member court on the appropriate approach to precedent. See Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 576-77 (2005).

226. Harry A. Blackmun Memorandum (undated) (Rodriguez de Quijas v. Shearson/American Express, No. 88-385, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 534). Perhaps “B” stands for “burden?” Justice Blackmun

In the margin by his description of the case's history, he wrote, "BRW [Bryon R. White] rides high!"²²⁷

In contrast to the clarity of his views on Justice White's agenda, Justice Blackmun was evidently unsure of the course he should take to express his views of the case. In the body of the memo he stated, "I w[oul]d – [reverse], but may n[ot] dis[sent.]"²²⁸ A note in the margin reads: "Put it up to Cong[ress] – [reverse]" with a line from the negative sign he used to symbolize reversal leading to an additional notation: "or join screaming."²²⁹ He seems to have tried out what he might say if he "join[ed] screaming." On a separate page he wrote:

I think now, as I tho[ugh]t t[he]n, t[h]a[t] t[he] C[our]t's deci[sion] in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), was wrong. The sec[re]t[ary]'s [illegible] insistence on t[he] integ[rity] [of] arbit[rati]on in t[he]se days [of] sad news in Wall St[reet], see _____ seems to me t[o] b[e] a frail reed on whi[ch] t[o] lean. But t[he] C[our]t h[as] spoken in McMahon, & it is illogical t[o] draw a distinct[i]o[n] b[e]tw[een] § 2(2) [of] t[he] 1933 Act & § 10(b) [of] t[he] '34 Act. I ∴ [therefore], wi[th] reluctance, join t[he] C[our]t's opin[i]on [on] t[hi]s part.²³⁰

In the end, despite this concern for consistency with the *McMahon* precedent, Justice Blackmun did not write separately, but joined Justice Stevens's short dissent.²³¹ A note to him from the clerk working on the case states:

Justice Stevens has circulated a dissent in this case. I recommend that you join it, although I imagine this dissent is not quite what you had in mind: it is a short stare decisis statement, rather than a full-blown review of the merits of why Wilco [sic] continues to make sense after McMahon. It does not strike me as the kind of case in which further writing would do much good, however.²³²

emphasized his points about *McMahon* being an error and infringing on Congress's role with check marks in the margin.

227. *Id.*

228. *Id.*

229. *Id.*

230. Harry A. Blackmun Note (undated) (*Rodriguez de Quijas v. Shearson/American Express*, No. 88-385, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 534).

231. *Rodriguez de Quijas*, 490 U.S. at 486 (Stevens, J., dissenting).

232. Memo from Deborah [Malamud] to Harry A. Blackmun (May 9, 1989) (*Rodriguez de Quijas v. Shearson/American Express*, No. 88-385, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 534).

IX. 1991: CIVIL RIGHTS CLAIMS ARBITRABLE

The Court reached the final stage of its progression toward complete arbitrability of statutory claims in *Gilmer v. Interstate/Johnson Lane Corp.*²³³ Here it faced a case completely outside the commercial context in which a plaintiff resisted arbitration of his civil rights claim under ADEA.

While the analysis in the *Gilmer* opinion concentrates on whether Congress intended to exclude ADEA claims from arbitration and whether arbitration would undermine the purposes of the statute, the ADEA is not mentioned at all in Justice Blackmun's conference notes. Most of the discussion he recorded was framed in terms of the tension between the Court's pro-arbitration stance in *Mitsubishi* and its decision permitting judicial consideration of a previously arbitrated civil rights claim in *Gardner-Denver*.

Chief Justice Rehnquist, for example, stated that the

cl[aim]s can b[e] subjected to arbit[rati]on
G[ardner]-D[enver] h[a]s a diff[erent] flavor – dist[i]ng[ui]sh
t[he]r[e] a C[ollective] B[argaining] A[greement]
π [plaintiff] h[a]s control
FAA applic[able] ∴ [therefore] arbit[rable]²³⁴

Justice O'Connor referenced *Mitsubishi* and stated "can dist[inguish] G[ardner]-Den[ver] C[ollective] B[argaining] A[greement]."²³⁵ Justice Kennedy's view was that the claims were "arbitrable per [the] Trilogy[.] n[ot] a C[ollective] B[argaining] A[greement]."²³⁶

Justice Stevens, who dissented, acknowledged that "Mitsu[bishi] is t[he] modern view" and the "G[ardner] D[enver] is in tension wi[th] it."²³⁷ But he interpreted the FAA in light of the scope of arbitration when it was enacted in 1925: "But n[ot] what Cong[ress] h[a]d in mind – t[he]y tho[ugh]t [for] commer[cia]l disputes, n[ot] Em[ploymen]t."²³⁸

The Justices also discussed whether or not they should decide the scope of the FAA's exclusion of certain employment contracts from the statute's coverage,²³⁹ an issue that arguably was not presented squarely in the case.²⁴⁰ In the

233. 500 U.S. 20 (1991).

234. Harry A. Blackmun Conference Notes (Jan. 16, 1991) (*Gilmer v. Interstate/Johnson Lane*, No. 90-18, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 575).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. Section 1 of the FAA reads in part: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2000).

end, they did not reach the issue in *Gilmer*, but the notes provide a preview of the Court's decision a decade later in which it continued to broaden the FAA by interpreting its exclusion of employment contracts narrowly.²⁴¹

Justice O'Connor found "§ 1 more diffi[cult]" but thought the Court should "Decide it," commenting that the "P[artie]s address it here[.] We h[a]v[e] ignored it in older cases."²⁴² Her position on the merits was that the Court should "say [the] except[i]o[n] [is] narrow & l[imi]t[e]d to E[m]ployees in trans[portation] or movem[en]t across St[ate] lines."²⁴³ Justice Scalia also preferred to "decide § 1 [only as] broadly as [the] categories."²⁴⁴ Justice Kennedy stated that "§ 1 pu[r]p[ose]s to preserve primar[i]ly t[he] Jones Act. So limit."²⁴⁵ Chief Justice Rehnquist observed that "this [is] n[ot] an empl[o]ym[en]t K [contract] w[ith]in t[he] except[i]o[n]."²⁴⁶ Justice Souter seems to have expressed doubts about deciding the section 1 issue in *Gilmer*: "§ 1?"²⁴⁷ Unlike the others who mentioned section 1, he indicated that if the Court reached the issue he would want to decide "§ 1 broadly."²⁴⁸

Why did Justice Blackmun abandon his position, so clearly expressed in the securities cases, against arbitration in the domestic context of claims brought under protective statutes? His memo reads: "G[ardner] D[enver] is strong lang[uage], but Mitsu[bishi] h[a]s intervened."²⁴⁹ Nonetheless he listed a number of reasons to find against arbitrability:

T[he]r[e] [a]r[e] good reasons for peti[tioner]:
 Judic[ial] review [of] arbit[rati]on award is narrow & diffi[cult]
 No rec[ord] or F[act]F[indin]gs.
 Forum controlled by opponents
 Fed[eral] c[our]ts' expertise
 Complexities [of] t[he] stat[ute]²⁵⁰

240. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

241. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001).

242. Harry A. Blackmun Conference Notes (Jan. 16, 1991) (*Gilmer v. Interstate/Johnson Lane*, No. 90-18, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 575).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*; see also *Circuit City Stores, Inc. v. Adams*, 352 U.S. at 139 (Souter, J., dissenting).

249. Harry A. Blackmun Memorandum at 1 (Jan. 12, 1991) (*Gilmer v. Interstate/Johnson Lane*, No. 90-18, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 575).

250. *Id.*

On the other side, Blackmun seems to have given some weight to a point about EEOC's enforcement power made by the court below.²⁵¹ His decision, however, seems to have been unrelated to narrow legal arguments. Following his list of reasons to restrict arbitration, he makes the following comments:

But I suspect this battle long since h[a]s b[een] lost
G[ardner] D[enver] still sounds good, but arbit[r]ation's t[ime]s
h[a]s arrived.

But nothing to FAA § 1 arg[u]m[en]t at this late date
My choice is to stay wi[th] t[he] old or go wi[th] t[he] new
I can + [affirm] & write to t[h]a[t] effect.²⁵²

There are checks in the margin next to the first and last lines, indicating that he planned to write a concurring opinion. He did not, however, write separately. In the end he decided to "go with the new" and joined the majority opinion supporting arbitration. Only Justices Marshall and Stevens dissented.

X. CONCLUSION

In looking at this series of cases as a whole, one notable feature is the nature of the justifications the Justices voiced in conference. Their explanations for their positions were most often framed in terms of statutory interpretation, but their comments showed a definite sensitivity to policy implications. It is also evident that the Justices' decisions in these cases intersected with their views on general legal principles and their positions in other contexts, among them the legitimacy of implied causes of action, the appropriate scope of securities regulation, and the meaning of Congressional silence in the face of a long-standing judicial interpretation of a statute. The vitality of the *Wilko* precedent was judged in the context of all these intertwined factors.

For some of the Justices, it is possible to discern a central theme motivating their positions based on their comments in conference. Justice White's shift to a pro-arbitrability position was largely unexplained, but was strongly displayed in his growing disdain for the precedential importance of *Wilko*. In contrast, Justice Stevens sought to maintain the application of the *Wilko* case, even though he disagreed with it, based on his view of the appropriate roles of Congress and the Court and the importance of stare decisis.

Overall, the cases reflect the Justices' increasing acceptance of arbitration itself. If any explicit discussion of the Court's endorsement of this process took place, however, it was in one of the other arbitrability cases the

251. In his catalog of the reasoning of the Court of Appeals for the Fourth Circuit he wrote "EEOC w[oul]d n[ot] b[e] precluded fr[o]m f[ill]ing." In the adjacent margin he noted, "pretty strong arg[u]m[en]t." *Id.*

252. *Id.* at 2.

Court decided during this period.²⁵³ Chief Justice Burger championed arbitration in his speeches as a way to improve efficiency,²⁵⁴ but there were no comments recorded in these cases urging arbitration's importance for reducing court dockets. In the *Byrd* case, Justice White did acknowledge one of the interests that led the dominant party to seek arbitration, noting "D[ean] W[itter] wants t[o] avoid puni[tive] dam[age]s in fed[eral] c[our]t."²⁵⁵ More often, support for arbitration was framed in terms of freedom of contract. Justice Powell noted in the *McMahon* case that he was "n[ot] a fan [of] arbit[rati]on but [it is] much improved[.] [The] p[artie]s made their agr[ee]m[en]t here."²⁵⁶ In *Scherk*, Justice Stewart's comment was "Arms length deal. Hold to t[he] promise."²⁵⁷

A number of factors influenced Justice Blackmun and as the sequence of cases progressed their level of significance to his decisionmaking varied. The importance with which he regarded international law and the functioning of the international order seems to have been crucial in his initial pro-arbitrability stance in the cases concerning transnational arbitrations. This conclusion is supported by his suggestion to Justice Stewart that the *Scherk* opinion should emphasize the New York Convention and its status as U.S. law, and is consistent with the importance he accorded to international perspectives more generally. In the domestic context, the importance of stare decisis, consistency in statutory interpretation, and his reading of Congressional policies protecting investors held sway, but by then the votes to halt the march of arbitration for statutory claims were lacking, even with his support.

Justice Blackmun's curiously resigned comments in his *Gilmer* memo speak to the completeness of the change wrought in these cases. With no precedent left to defend on grounds of stare decisis, a substantive statute (ADEA) that lacked the special provisions of the Securities Acts, and the

253. Perhaps the Justices discussed the merits of arbitration when they decided *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in which the Court first emphasized that federal policy favors arbitration of commercial disputes. *Id.* at 24-25.

254. See, e.g., Warren E. Burger, *Isn't There a Better Way?*, *Annual Report on the State of the Judiciary at the Midyear Meeting of the American Bar Association*, 68 A.B.A. J. 274, 277 (1982) (proposing to relieve overburdened courts with a system of arbitration).

255. Harry A. Blackmun Conference Notes (Dec. 7, 1984) (Dean Witter Reynolds, Inc. v. Byrd, No. 83-1708, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 421).

256. Harry A. Blackmun Conference Notes (Mar. 6, 1987) (*Shearson/American Express v. McMahon*, No. 86-44, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 479).

257. Harry A. Blackmun Conference Notes (Apr. 29, 1974) (*Scherk v. Alberto-Culver Co.*, No. 73-781, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 189).

sense that he would have been fighting a losing battle, he seems to have decided to embrace arbitration, even for civil rights claims, as inevitable.

In addition to what they reveal about the substantive judgments and individual motivations behind the Court's decisions on statutory arbitrability, the Papers also demonstrate the nature of the collective enterprise. They provide little evidence of discussion or attempts to persuade fellow Justices during the voting process in conference. Justice Blackmun's notes are more consistent with a series of announcements accompanied by statements by the Justices describing the reasoning behind their votes. It is in the process of drafting and joining opinions that the Papers reveal the role of collegial criticism and compromise in the institutional development of decisions.

In this series of cases, it is moreover possible to see how the effects of institutional norms of collegiality can extend beyond the bounds of a single case to influence the overall arc of doctrinal development. Rather than insisting that Justice Stewart drop the section of the *Scherk* opinion with which he disagreed, Justice Blackmun compromised and it remained as dictum. In retrospect, Blackmun's (and reportedly Powell's) restraint had an important effect on the development of arbitrability doctrine. By resurfacing *Scherk's* analytical framework and using it to bring the previously-settled question of domestic securities arbitration before the Court, Justice White's activism made it possible for the majority to permit the removal of statutory claims from federal courts to private arbitration.

